IN THE

Supreme Court of the United States

October Term, 1942

No. 407 3

A. M. ANDERSON, Receiver of the National Bank of Kentucky,

Petitioner,

v.

KATHERINE KIRKPATRICK ABBOTT, Administratrix of the Estate of David J. Abbott, deceased, et al.,

Respondents.

BRIEF FOR PETITIONER

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CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Preliminary Statement 3
'Question Presented 5

Facts of the Case 7
1. National Bank of Kentucky's Financial Condition Unhealthy on April 23, 1927 7
2. No Improvement in Its Conditions During Next Six Months 8
3. National Bank of Kentucky's Condition at March 9, 1928, Shows That It Was Getting Worse 14
4. Bank's Condition Was Very Bad at October 13, 1928 16
5. When BancoKentucky Was Promoted and Organized, National Bank of Kentucky Was in a Precarious Condition 18
6. BancoKentucky Organized in July 1929 23
7. Business Conducted by Banco Exclusively a Holding Company Business 29
8. Banco One of Many Plans Suggested as a Means of Avoiding Charge-Off of Bad Loans 33
9. Bank Shareholders Continued to Manage Bank After the Exchange, and Received the Same Dividends 35

Specifications of Error 38

Argument 38
Regardless of "Record" Ownership, the "Real" or "Beneficial" Owner Is Liable for Assessment 38
Bank Stock Holding Company Cases 45
Analysis and Criticism of Opinions Below 56

PAGE

Conclusion 62

Appendix—

Prospectus July 19, 1929 63

Statutes Involved 68

TABLE OF CASES

Anderson v. Abbott, 32 F. Supp. 328 56

Anderson v. Abbott, 127 F. (2d) 696 .... 56, 57, 59

Anderson v. Akers, 7 F. Supp. 924 (1934) 62

Anderson v. Atkinson, 22 F. Supp. 853 (District Court, Illinois, 1938) 2, 53

Bacon v. Barber, 110 Vt. 280, 6 A. (2d) 9 (1939) 56

BancoKentucky Company's Receiver v. National Bank of Kentucky's Receiver, 281 Ky. 784, 137 S. W. (2d) 357 (1939) 32, 51

BancoKentucky Company's Receiver v. Louisville Trust Co.'s Receiver, 263 Ky. 155, 92 S. W. (2d) 19 (1936) 28

Barbour v. Thomas, 86 F. (2d) 510, cert. den. 300 U. S. 670 (1937) 39, 47, 48, 50

Bowden v. Johnson, 107 U. S. 251 (1882) 40

Brusselback v. Cago Corp., 85 F. (2d) 20, cert. den. 299 U. S. 586 (1936) 41, 52

Central Life Securities Co. v. Smith, 236 F. 170, C. C. A. 7 (1916) 44

C. M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Association, 247 U. S. 490 (1918) 42

Christopher v. Norvell, 201 U. S. 216 (1906) 40

Corker v. Soper, 53 F. (2d) 190, C. C. A. 5 (1931), cert. den. Corker v. Howard, 285 U. S. 540 .... 41, 46

Deming v. Schram, 7 Fed. Supp. 271 49

Durrance v. Collier, 81 F. (2d) 4 (C. C. A. 5, 1936) 41, 47

Early v. Richardson, 280 U. S. 496 (1930) 40

English v. Gamble, 26 F. (2d) 28 (C. C. A. 8, 1928) 40

PAGE

Flanagan v. Madison Square State Bank, 302 Ill. App. 468, 24 N. E. (2d) 202 (1939) 56
Fors v. Farrell, 271 Mich. 358, 260 N. W. 886 (1935) 41, 54
Galinski v. Adler, 302 Ill. App. 474, 24 N. E. (2d) 205 (1939) 56
Hansen v. Agnew, 195 Wash. 354, 80 P. (2d) 845 (1938) 41, 55
Harris Investment Co. v. Hood, 123 Fla. 598, 167 So. 25 (1936) 41, 55
In re Burntside Lodge, Inc., 7 F. Supp. 785 43
McDonald v. Dewey, 202 U. S. 510 (1906) 40
Metropolitan Holding Company v. Snyder, 79 F. (2d) 263 (C. C. A. 8, 1935) 41, 51
National Bank v. Case, 99 U. S. 628 (1878) 40, 59, 60
Nettles v. Rhett, 94 F. (2d) 42 (C. C. A. 4, 1938) 41, 45
Nettles v. Sottile, 184 S. C. 1, 191 S. E. 796 (1937) 41, 54
Northern Securities Co. v. United States, 193 U. S. 197 (1904) 42, 44
Ohio Valley National Bank v. Hulitt, Rec., 204 U. S. 162 (1907) 40, 42
O'Keefe v. Pearson, 73 F. (2d) 673 (C. C. A. 1, 1934) 40
Partridge v. Ainley, 28 F. Supp. 472 (District Court, New York, 1939) 53
Pauly v. State Loan, 165 U. S. 606 (1897) 40, 41
Pepper v. Litton, 308 U. S. 295 (1939) 42
Schlener v. Davis, 75 F. (2d) 371 (C. C. A. 5, 1935) 41
Stuart v. Hayden, 169 U. S. 1 (1897) 40
United States v. Delaware L. & W. Ry. Co., 238 U. S. 516 (1915) 42
United States v. Lehigh Valley Railway Company, 220 U. S. 257 (1911) 42
White v. Aaronson, 169 Misc. 593, 7 N. Y. S. (2d) 901 (1938) 56

STATUTES

	PAGE
12 U. S. C. 28	2
12 U. S. C. 63	3, 6, 39
12 U. S. C. 66	40
12 U. S. C. 192	6
Kentucky Stat. 571	62
Kentucky Stat. 581	62
Kentucky Stat. 609	62

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OPINIONS BELOW

The District Court filed two opinions, one overruling defendants' motion to dismiss reported in 23 F. Supp. 265. This opinion is in the Record, Vol. 1, p. 144. The second opinion of the District Court, dismissing the Bill of Complaint on the merits, was filed March 23, 1940, and is reported in 32 F. Supp. 328, and will be found in the Record, Vol. 1, p. 288. Similar suits were filed, and are now pending, against other shareholders residing in other states. A motion to dismiss the Bill of Complaint, filed

in the Northern District of Illinois, was also denied, in an opinion filed February 14, 1938. *Anderson* v. *Atkinson*, 22 F. Supp. 853.

On May 4, 1942, the United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court for the Western District of Kentucky. This opinion is reported in 127 F. (2d) 696 and will be found in the Record, Vol. 3, p. 312. The petitioner's application for rehearing (R. 3, p. 327) was denied on June 5, 1942, without written opinion (R. 3, p. 355).

JURISDICTION

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Section 240A of the Judicial Code as amended by the Act of February 13, 1925 (United States Code, Title 28, Sec. 347). On August 26, 1942, this Court extended the time for filing a petition for writ of certiorari until November 24, 1942. On December 7, 1942, this Court granted the petition for writ of certiorari.

PRELIMINARY STATEMENT

National Bank of Kentucky of Louisville failed November 16, 1930, closed by voluntary resolution of its Board of Directors (Ex. V. 1, p. 1). It was a bad failure; dividends to depositors have been only 77 per cent. The amount sought in this and similar suits would produce another 10 per cent. On November 17, 1930, the Comptroller of the Currency being satisfied that it was "insolvent and unable to pay its just and legal debts" appointed a Receiver therefor (Ex. V. 1, p. 3). On February 20, 1931, upon an "accounting" and a "valuation of the uncollected assets" the Comptroller of the Currency found that in order to pay the debts of the bank it was necessary to

"enforce the individual liability of the stockholders" (Sec. 5151, Sec. 5234, R. S., 12 U. S. C. 63, 192). He thereupon made "an assessment and requisition upon the shareholders" in the amount of $4,000,000, for the par value of each and every share of the capital stock and directed the Receiver "to take all necessary proceedings, by suit or otherwise, to enforce" the same (Ex. V. 1, p. 6).

As will be explained later herein, substantially all the stock of National Bank of Kentucky, at the time of its failure, was held of record in the name of a bank stock holding corporation, known as BancoKentucky Company, of Delaware, having been transferred to the holding company in exchange for holding company stock one year before, at a time when National Bank of Kentucky was in a precarious financial position. BancoKentucky and the bank failed at the same time. Its only assets consisted of assessable bank stocks. Its chain of banks also collapsed at the same time.

It became apparent to the Receiver of National Bank of Kentucky, shortly after the assessment was levied, that the assets of BancoKentucky would be wholly inadequate to meet this statutory liability. Its ordinary liabilities had been more than doubled by bank assessments. He realized, however, the duty to proceed against BancoKentucky as the "*record*" owner of the bank stock and to realize for his depositors, from that source, as much of the assessment as he would be lawfully entitled to. He would have been remiss in his duty had he not done so. It was all to the advantage of the "real" stockholders, shareholders of BancoKentucky, respondents, because whatever he collected from Banco reduced the amount to be collected from them. But before he proceeded against Banco he was quite careful to notify each stockholder of Banco, by registered mail, of his intention to proceed against them, as the "real" shareholders of National Bank of Kentucky, to the

extent that he failed to collect from Banco. Not a single stockholder complained. His notice reads:

> "As a stockholder in The BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, payable at the office of the Receiver, on or before April 1, 1931. A notice of such assessment and a demand for payment of the same has been served upon the Receiver of The BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. You will, therefore, take notice that it is the intention of the undersigned, as Receiver of The National Bank of Kentucky, to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said BancoKentucky Company, to the extent that the undersigned, as Receiver of The National Bank of Kentucky, is unable to collect said assessment from The BancoKentucky Company or its Receiver" (Ex. V. 1, p. 7).

As explained later, the "trustees' participation certificates," referred to in the notice above, represented the ownership of Louisville Trust Company as well as National Bank of Kentucky stock under a trust agreement "unifying" ownership of both banks in one certificate. A certificate represented approximately 70% National Bank and 30% Louisville Trust stock (R. 2, p. 244).

Subsequently the Receiver recovered a judgment against the Receiver of BancoKentucky Company for the entire amount of the assessment ($3,772,162.14). Because of its hopeless insolvency he was able to collect but a small

part ($90,745.17) of the judgment (Ex. V. 4, p. 1871). He thereupon brought this suit against the defendant stockholders of BancoKentucky, residing in the Western District of Kentucky, in which he seeks to recover from each his or her proportionate part of the balance of said assessment. Similar suits against other stockholders residing in the Eastern District of Kentucky, Massachusetts, Michigan, New York, Pennsylvania, Tennessee, Indiana, Illinois, Virginia, and West Virginia, were filed in the appropriate Federal District Courts of said several states and are now pending, awaiting the final decision in this case.

The District Court in the instant case in an opinion overruled the defendants' motion to dismiss; but later upon a trial on the merits entered judgment for the defendants. An appeal was taken by the Receiver to the United States Circuit Court of Appeals for the Sixth Circuit and upon a hearing the judgment of the District Court was affirmed.

The legal question presented is:

> *"Are the owners of an insolvent National Bank relieved from individual liability or 'double assessment' under the applicable Federal statute, because shortly before the bank's failure, they organized a holding company and exchanged their bank shares for holding company shares?"*

The District Court, upon the trial of the facts on the merits, answered the question in the affirmative; holding in effect that the stockholders, in creating Banco and exchanging for its stock, had found a method of retaining all the advantages of ownership of National Bank stock without the concomitant statutory liability for assessment. This decision was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit, which subsequently denied a petition for rehearing. This review is presented to reverse said judgment.

The Bill of Complaint was based upon the alternative theories that the entire plan of the bank stockholders to form Banco, exchange bank stock for Banco stock, and thus through the holding company, as their agent and instrumentality, to continue in the banking business by owning and operating a chain of state and national banks, was in and of itself unlawful; that notwithstanding the transfer of bank shares for Banco shares, the defendants continued in law to be the actual, real and beneficial bank stockholders by retaining control of the bank and continuing to receive all the dividends and benefits incident to ownership; that when the stockholders of the failing National Bank, knowing that their bank stock was subject to assessment, evolved the scheme and plan to exchange National Bank stock for Banco stock and attempt to make the Banco stock nonassessable by providing in the Articles of Incorporation and on the stock certificates that it should be "nonassessable," they were plainly and intentionally attempting to evade Sections 5151 and 5234 of the Revised Statutes of the United States, 12 U. S. C. 63, 192 (Sec. 1c 156, Act June 30, 1876, as amended); that by reason of all the foregoing they were not entitled, in equity and good conscience, thus to shield themselves from assessment liability as national bank stockholders by interposing the corporate entity of their creature, Banco Kentucky, between them and the assessment liability; and that they continued until the failure, to remain the real, true and beneficial bank shareholders, liable for the assessment, and estopped to say otherwise.

FACTS OF THE CASE

National Bank of Kentucky was in an unhealthy condition for three full years before it failed on November 16, 1930. Its financial condition grew worse gradually and was very bad in June, 1929, when BancoKentucky was organized, and even worse in October, 1929, when the bank shareholders exchanged their bank stock for BancoKentucky stock. It failed, and so did Banco, exactly thirteen months and sixteen days after the exchange was made.

The above general statement is not argumentative. It is supported by actual and uncontradicted written records of the National Bank of Kentucky introduced in evidence in this case and appearing in great detail in the record before this Court.

1. National Bank of Kentucky's Financial Condition Unhealthy on April 23, 1927

National Bank of Kentucky was examined by the National Bank Examiners on April 23, 1927, which was more than three years before the failure. The examination was concluded on May 12, 1927. The Examiners' report was lodged with the Comptroller of the Currency. A copy of the report, as is customary, was promptly sent to the Board of Directors of the bank. The full report of the examination is in the record (Ex. V. 1, pp. 224 to 313).

A few facts taken from the report are sufficient: the bank's President, James B. Brown, owed $261,523.01 on direct obligations and was liable as surety for $519,107.11 additional (Ex. V. 1, p. 226). Officers and directors owed $1,019,210.46, of which $727,064.00 was unsecured by collateral (Ex. V. 1, p. 225). Corporations, in which officers and directors were largely interested, owed $2,307,902.72, of which over two million was unsecured (Ex. V. 1, p. 225). Its credit files were "incomplete" (Ex. V. 1, p. 308). It had statutory "bad debts as defined" in Sec. 5204, Re-

vised Statutes, amounting to $968,658.12, and "other overdue paper" of $1,204,169.36 (Ex. V. 1, p. 236). In the preceding six months it had charged off $171,473.46 on bad notes (Ex. V. 1, p. 304), and was required to charge off an additional $137,775.38 as a result of this examination (Ex. V. 1, p. 306). Its deposits had shrunk from $56,700,000.00 at February 11, 1927, to $49,400,000.00 at the date of this examination (Ex. V. 1, pp. 179, 224). Its "overdrafts" amounted to $438,960.96 (Ex. V. 1, p. 224). The deposit accounts of Brown, the President, had been overdrawn $30,993.44 for five months, and his newspaper, *Herald Post*, $74,917.82 for four months. Overdrafts of these two accounts were termed by the Examiner as "habitual" (Ex. V. 1, p. 298). It had "excessive loans," that is, loans made in violation of Federal Statutes, of $2,427,310.83 (Ex. V. 1, p. 272). Its "criticized" loans were classified by the Examiner as follows:

"Overdue Class A"	$ 968,658.12
"Overdue Class B"	1,204,169.36
"Slow"	5,000,160.12
"Doubtful"	567,353.47
"Loss"	137,175.16

(Ex. V. 1, p. 270.)

The "attention" of the Board of Directors was promptly "directed to the criticisms of the Examiner" by the Comptroller of the Currency by letter, in which they were requested, after the next meeting of the Board, to reply advising "as to the action taken or to be taken in regard to these matters." In part, the Comptroller said:

"The report of an examination of your bank completed on May 12, has been received and your attention is directed to the criticisms of the Examiner on Pages 11-1 and 11-2.

"In addition to the estimated losses of $137,775, which it is understood are to be charged off on June 30, the bank is carrying an excessive amount of slow and doubtful assets amounting to $5,820,271, and $601,818, respectively, which have been steadily increasing, in spite of the fact that a substantial amount of losses has been charged off following each examination in the past two years. Overdue paper is also excessive in amount, the aggregate being $2,172,827, and includes statutory bad debts of $968,658. The Examiner has listed on the sheets following Page 6, a long list of large lines and other loans especially mentioned, which in his opinion require reduction, security, or supporting credit information. He has also listed several loans in excess of the legal limit, and a number of unwarranted overdrafts and cash items.

"It is evident that these matters have not been receiving sufficient attention, and it is urged that you review the report at your next board meeting, and take the necessary remedial measures.

"It is noted that the excessive loans to the Kentucky Jockey Club and the Consolidated Realty Company were to be reduced to the legal limit within a reasonable time; but that exception was taken to the classification of Wakefield & Company's loan as excessive. It is evident from the statement of the Examiner on Page 5-1 that the loans of the individuals included in this line were for the accommodation of Wakefield & Company, and should, therefore, be included with its direct liability and the line reduced to the 10% limit.

"Attention is directed to the Examiner's comment in regard to the credit files, and loans sold to country banks, which should receive proper attention.

"It is noted that $100,000 of the Kentucky Wagon Company line was included in the losses to be charged off, and it is believed that further substantial charge-offs should be made periodically until the line is reduced to a conservative figure" (Ex. V. 3, p. 1275).

No reply was given to the above letter and again on September 7, 1927, the Comptroller wrote:

"... please advise, over the signatures of the available directors, whether the excessive loans have been reduced to the legal limit; the total collections obtained in the overdue and slow paper and the reduction or improvement made in each of the doubtful loans as well as in the large lines and other loans especially mentioned" (Ex. V. 3, p. 1277).

In spite of this unhealthy condition, or better perhaps because of it, National Bank of Kentucky, right at this time, went into a sort of partnership with Louisville Trust Company, a large state bank. Louisville Trust Company failed the same day National Bank of Kentucky failed, so it was a case of two weak brothers leaning on each other for support. Big publicity attended this "unification" or "merger," as it was called (Ex. V. 1, p. 156). National Bank of Kentucky increased its capital one and one-half million to four million by an entry transferring credit from its bookkeeping surplus and undivided profits (Ex. V. 1, p. 159). A mere gesture since its capital structure remained the same. No new money was invested. There was no legal merger however. The national and state banks continued their separate existence but with the same stockholders and identical Boards of Directors. The stock certificates of the two banks were deposited with Trustees who issued, in lieu thereof, what was called a Trustees' Participation Certificate, representing an undivided interest in both National Bank and Louisville Trust stock (Ex. V. 1, pp. 152, 153). The trust agreement, under which the bank stocks were deposited and trust certificates issued, in part provided:

"(3) Each owner of a Trustees' Participation Certificate issued hereunder shall be subject to the same liability thereon as he would have been subject to in

case he had been the owner of record of such proportionate part of the shares held by the Trustees in any corporation as the number of shares called for by his Trustees' Participation Certificate bears to the whole number of shares covered by all outstanding Trustees' Participation Certificates; and to such extent he shall indemnify and hold harmless the Trustees owning such stock from any loss or liability on account of being the holders or owners thereof. The measure of liability assumed hereunder shall be the same as that provided by law with reference to the holders of stock in any particular corporation in which the Trustees may hold stock as is provided by law with reference to the holders of such stock, and no more" (Ex. V. 1, p. 29).

2. No Improvement in Its Condition During Next Six Months

The Bank Examiner's report of October 14, 1927 (Ex. V. 1, pp. 315 to 406), shows that the unhealthy condition existing six months previous (see pp. 7 to 10, infra) had not improved, notwithstanding "unification" with Louisville Trust Company and the publicity attending the same. It requires substance to clean up a failing national bank.

At this date, three years before the bank failed, and two years before the stockholders exchanged bank stock for holding company stock, its deposits had declined another million dollars, a total of seven million from February 11, 1927 (Ex. V. 1, p. 315). Its borrowed money or "bills payable" at Federal Reserve went up $3,050,000.00 since the last examination. In addition, it owed $200,000.00 on a repurchase agreement obligation (Ex. V. 1, p. 396). Overdrafts were $342,797.38; down a little bit because notes were taken from some of the overdraft obligors (Ex. V. 1, p. 315).

It was deficient in its legal reserve requirements in the amount of $153,988.00 (Ex. V. 1, p. 393). This condition as to legal reserve was chronic, not casual. The legal reserve deficit was $160,930.00 on August 11; $257,580.00 on September 11; and $450,720.00 on October 11, 1927 (Ex. V. 1, pp. 191, 193, 195). Loans to officers and directors increased to $1,184,248.53 (Ex. V. 1, p. 316). Loans to corporations in which officers and directors were largely interested, increased to $2,733,583.89, an increase of over $400,000.00 (Ex. V. 1, p. 316). President Brown's debts were about $700,000.00, a slight improvement over the previous examination. The *Herald Post* loan, Brown's newspaper, was $400,000.00 (Ex. V. 1, pp. 319, 322). The race track loans, Kentucky Jockey Club and Lincoln Fields, at Chicago, were $739,980.00 and $350,000.00 respectively, a total increase of $350,000.00 (Ex. V. 1, p. 380). The bank still had illegal or excessive loans of $1,674,980.00 and "overdue" loans of $1,867,725.36 (Ex. V. 1, pp. 373, 331). It had charged off on bad loans since the last examination $138,980.20 (Ex. V. 1, p. 398). Two very large loans, known as the Campbell and Kentucky Wagon Lines, were severely criticized by the Examiner. As to the Campbell loan, $2,092,956.24, the Examiner said in his report:

> "Your examiner cannot escape the conviction that this line as described, is a source of potential danger to the bank" (Ex. V. 1, p. 405).

As to the Kentucky Wagon loan, $1,001,150.33, he said:

> "The only safe course for the management of the bank is to continue making periodical charges to Profit and Loss until the property can be sold. At least $100,000 should be charged off each six months until the plant can be sold or the carrying value reduced to at least $600,000" (Ex. V. 1, p. 353).

Its "criticized" loans were classified by the Examiner as follows:

"Overdue Class A"	$1,303,239.12
"Overdue Class B"	564,486.24
"Slow"	5,675,509.87
"Doubtful"	795,530.33
"Loss"	150,886.05

(Ex. V. 1, p. 371.)

The Comptroller of the Currency wrote to the Board of Directors as to this examination, in which, among other things, he said that it

> ". . . shows a most unsatisfactory condition which seems to be growing worse, and requires your close attention and more conservative policy in making loans and investments, and more vigorous action in liquidating or improving the condition of those which are subject to criticism.
>
> "Although losses in substantial amounts have been charged off in the past few years, the bank continues to be burdened with a large accumulation of slow and doubtful assets which are largely represented in the large concentrations of credit and 'other loans especially mentioned' in Pages 6-1 to 6-12 of the report, and in the schedule of bonds, securities, etc. As a result of the recent affiliation with the Louisville Trust Company and an increase in the capital stock and dividend requirements, the ability of the bank to absorb its losses out of current earnings has been decreased, and if it is necessary to continue charging off losses in a substantial amount, as seems probable, the condition will be reflected in the bank's published statements. Overdrafts in excessive amounts have been repeatedly shown in reports of examination and in published reports of conditions, and accommodations of this character should be restricted."

The Comptroller also said:

> "The bank has been subject to repeated criticism for granting excessive loans, and it is requested that

the Wakefield & Co. loans be reduced to the legal limit without further delay, and that the requirements of the law be strictly observed in the future" (Ex. V. 3, pp. 1278, 1279).

3. National Bank of Kentucky's Condition at March 9, 1928, Shows That It Was Getting Worse

The Bank Examiner's report of the bank examination of March 9, 1928, showed a further decline in its financial position (Ex. V. 1, pp. 408 to 485). Its deposits went down another $5,000,000.00, a total of $13,000,000.00 since February 11, 1927 (Ex. V. 1, p. 408). Its borrowed money at that particular day was only $200,000.00, but the report showed that its average borrowings since the last examination amounted to $2,400,000.00 (Ex. V. 1, p. 474). Its officers' and directors' loans, direct and indirect, remained at $2,732,207.03 (Ex. V. 1, p. 409). Corporation loans, in which officers and directors were largely interested, were $2,591,103.18, nearly $2,000,000.00 of which was still unsecured (Ex. V. 1, p. 409). President Brown's loans, direct and indirect, were fairly constant at $684,830.72 (Ex. V. 1, p. 410). It was deficient in legal reserve in the amount of $671,364.61, an increase from the last examination of $500,000.00 (Ex. V. 1, p. 471). Overdrafts were "habitual" (Ex. V. 1, p. 471). Statutory bad debts were $1,451,360.06; other overdue loans were $414,341.76, a total of $1,865,701.82 (Ex. V. 1, p. 422). Another $151,382.05 was charged off on bad notes since the last examination (Ex. V. 1, p. 476). Illegal or excessive loans of Kentucky Jockey Club, $610,200.00, and Wakefield and Company, $736,960.00, were listed (Ex. V. 1, p. 455). Again the Kentucky Wagon loan, $1,015,461.06, and Campbell loan, $1,801,268.20, were criticized (Ex. V. 1, pp. 458, 461). In spite of previous criticisms of Kentucky Wagon, its loans were increased $114,330.73 since the last exami-

nation (Ex. V. 1, p. 436). As to these loans the Examiner stated in his report:

> "Your examiner is of the opinion that the assets of this bank which require the most serious attention of the management are included in large lines as listed on page 6 and supplemental pages. They total quite large sums and are thought to be potential sources of large losses. The most careful and active attention should be given, as well as to other substandard assets listed in this report" (Ex. V. 1, p. 479).

As to the Campbell loans, the Examiner stated:

> "Such a situation cannot be considered as a banking proposition. To say the least, it is a very undesirable condition for a national bank to have interest in such a matter, and with the additional criticism of the matter of adequate security, it behooves the management of this bank to give the above line its most careful and active attention" (Ex. V. 1, p. 461).

In this report, the bank loans criticized by the Examiner were classified as follows:

"Overdue Class A"	$1,451,560.08
"Overdue Class B"	414,341.74
"Slow"	4,640,344.25
"Doubtful"	703,186.31
"Loss"	151,266.58

(Ex. V. 1, pp. 422, 478.)

As was done following the previous examinations, the Comptroller of the Currency again wrote the Board of Directors of the bank, in which, among other things, he said as to the Campbell line:

> "This line is entirely unwarranted in size and, from a credit standpoint, is considered to be a real danger to the bank" (Ex. V. 3, p. 1283).

The Comptroller also said:

> "Other matters shown by the report requiring your particular attention are the statutory bad debts aggregating $1,451,560, slow and doubtful assets aggregating $5,210,863 and $868,154 respectively and other loans especially mentioned."

The Comptroller also called attention to non-conforming real estate loans, deficiencies in reserves, illegal cash items and overdrafts. He referred specifically to President Brown's habitual overdrafts, and further stated:

> "The condition of the bank warrants the attention of every member of the board, and you are reminded of your oaths of office and your responsibility to the shareholders for the safe management and proper conduct of its affairs. It is your duty to see that the bank is properly and lawfully conducted and no officer should be permitted to dominate the policies to the extent of jeopardizing the best interest of the bank or violating the requirements of the law and good banking" (Ex. V. 3, p. 1284).

4. Bank's Condition Was Very Bad at October 13, 1928

A regular national bank examination was again held on October 13, 1928 (Ex. V. 2, pp. 486 to 571). This date is a little more than six months before BancoKentucky was organized and just about a year before the exchange of bank stock for Banco stock. This examination discloses that: Its deposits had declined two and one-half million dollars more since the last examination in April, 1928, a total decline since February 11, 1927, of over fifteen million dollars (Ex. V. 2, p. 486). Its borrowed money, "bills payable," and rediscounts had gone up to $5,666,301.96, an enormous increase (Ex. V. 2, p. 561). Its overdrafts amounted to $243,322.58 and were considered "habitual" (Ex. V. 2, p. 558). President Brown's loans remained stationary at $679,321.06 (Ex. V. 2, p. 488). Officers' and

directors' loans, direct and indirect, jumped to $3,145,-002.50; and loans of corporations, in which officers and directors were principally interested, jumped to $3,025,-891.98 (Ex. V. 2, p. 487). Its legal reserve was deficient in the amount of $142,682.00 (Ex. V. 2, p. 558). The large Kentucky Wagon line was again criticized. Notwithstanding the fact that $100,000.00 of this line had been charged off as loss at the time of the previous examination, the bank had extended further credit to it in the amount of approximately $167,000.00 (Ex. V. 2, p. 518). The large Campbell line was also again criticized (Ex. V. 2, p. 545). As to overdrafts the Examiner's report stated:

> "The last published report of condition of this bank showed overdrafts aggregating $271,502.88. This is the largest amount of published overdrafts that has ever come to the attention of your Examiner. It is the subject of comments by other bankers, and has in a degree embarrassed examiners. Of course the effect cannot be favorable to the bank" (Ex. V. 2, p. 567).

The bank's loans, criticized by the Examiner, were classified as follows:

"Overdue Class A"	$1,200,857.75
"Overdue Class B"	567,254.83
"Slow"	5,108,832.50
"Doubtful"	909,949.27
"Loss"	80,185.16

(Ex. V. 2, p. 540.)

The Comptroller of the Currency also wrote the Board of Directors as to this examination, in which he stated:

> "Its condition is becoming more unsatisfactory, with slow and doubtful assets and losses sufficient in amount to threaten an impairment of the surplus fund.
>
> "It appears from the report that the greater part of the slow and doubtful assets is represented in the large lines of the Kentucky Wagon Company, Camp-

bell, and Consolidated Realty Company. . . . It is hoped that the plans for refinancing these companies will be carried to a successful conclusion, but if they are not you should make some arrangement to eliminate these large lines from the bank's assets for they are a source of danger and embarrassment to it" (Ex. V. 3, p. 1288).

5. When BancoKentucky Was Promoted and Organized, National Bank of Kentucky Was in a Precarious Condition

A regular examination of the National Bank of Kentucky began on May 25, 1929, and consumed twenty-two days. This examination was conducted by the Chief National Bank Examiner (Ex. V. 2, pp. 572 to 652). During this examination the Chief Examiner discussed at length with the President and other officers the unsatisfactory condition of the bank (Ex. V. 2, p. 650). As a result of these conferences it was promised to the Examiner that a holding company would be formed, with new capital, and that the criticized assets would be taken out of the bank.

National Bank of Kentucky at this time was in a deplorable condition, as its own records plainly show. Its condition at that time might well be said to be desperate. Its deposits had dropped over six million dollars since the last examination, made about six months before (Ex. V. 2, p. 572). This was the fulfillment of the Examiner's prophecy in the previous report when he said that "other bankers" had commented on its large "published overdraft" position which "embarrassed the Examiners" and that "the effect cannot be favorable to the bank" (Ex. V. 2, p. 567). This was a total deposit loss of twenty-one million dollars in the two-year period from February 11, 1927, to May 25, 1929 (Ex. V. 1, p. 179; Ex. V. 2, p. 572). A deposit shrinkage from $56,700,000.00 to $35,099,000.00, or over 38%. The deposit withdrawals alone would be a

very serious matter, but, coupled with the financial inability of the bank to rid itself of enormous bad loans, made the situation precarious indeed.

Borrowed money in this period had reached staggering proportions and amounted to $14,131,945.19. At this time the bank owned $9,580,800.00 in Government securities, of which all but $547,100.00 were pledged. It owed the Federal Reserve Bank $11,464,190.41; Guaranty Trust of New York, $907,000.00; National Bank of the Republic, Chicago, $500,000.00; Bank of America of New York, $1,060,754.78. In addition to all this it owed to the Stewart Dry Goods Company of Louisville, a department store, $200,000.00 for bonds borrowed. Its total borrowings amounted to over 40% of its deposits (Ex. V. 2, p. 647).

It was not deficient in legal reserve at the date of the examination, May 25, 1929, but it had been deficient in legal reserve on the day previous in the amount of $412,360.00. It had a deficiency in legal reserve for nine of the days in which the examination was taking place. The deficiency on May 31, 1929, was $1,096,760.00, and two days after the Bank Examiner left the bank, June 17, 1929, the deficiency in legal reserve jumped to $1,367,220.00, and on the following day it increased to $1,972,385.00 (Ex. V. 4, p. 1868).

It still had overdrafts of $154,268.70. Of this, $125,282.03 was the insolvent and habitually overdrawn Kentucky Wagon Company (Ex. V. 2, p. 641).

Loans, direct and indirect, to officers and directors amounted to $3,269,707.43. Loans to corporations in which officers and directors were largely interested amounted to $3,029,964.16 (Ex. V. 2, p. 573). President Brown's loans remained static at $657,294.24 (Ex. V. 2, p. 574). Its statutory bad debts amounted to $1,469,771.83. Other overdue loans amounted to $753,042.28 (Ex. V. 2, p. 592). It also had "loans exceeding the limit prescribed by Section 5200

of the Revised Statutes" amounting to $1,190,000.00, of which all except $20,000.00 were "inadequately secured" (Ex. V. 2, p. 629). Its desperate condition was reflected in the fact, as shown in the report, that it had sold to small country banks eight loans criticized by the Examiner in his previous report (Ex. V. 2, pp. 585, 586). The large credit lines extended to Kentucky Wagon, $1,340,474.38, and Campbell, $1,073,166.57, and Murray Rubber, $1,101,719.96, criticized in many previous examinations, were again adversely commented on by the Examiner. As to these loans the Examiner stated:

> "A grave potential danger lies in these large concentrations of credit" (Ex. V. 2, pp. 631, 632, 650).

With reference to Murray Rubber the report stated:

> "In general the statement shows an indebtedness of $2,049,884.00 against a net worth of $862,582. In other words, the debt of the company is two and one-half times its net worth. . . . It is evident that the company could not continue to operate long without a radical change in the result of its operations. The operating loss for April was $29,883.00. A few more months with such results would surely lead to insolvency" (Ex. V. 2, p. 617).

As to the E. B. Norman & Company loan of $552,871.25 the report stated:

> "It will be a great relief, if, and when, this large indebtedness of the company to the bank can be liquidated. It is a particularly heavy burden for the bank to bear during a time when it is having to use liberally the rediscount privileges of the Federal Reserve Bank" (Ex. V. 2, p. 620).

As to the Campbell loan the report states that the line is "thoroughly undesirable" (Ex. V. 2, p. 595).

The Kentucky Wagon loan, then amounting to $1,340,-474.38, was severely criticized. As to this loan the report says:

> "Since last examination this line has increased $257,932.07. One of the disturbing facts in connection with this asset is the progressive increase in amount that has been shown. The first examination made of this bank by your Examiner was in November 1925. The aggregate amount of the loan at that time was $1,039,000.00. Since that time, there has been charged to Profit and Loss $650,000.00. The line is now $301,-474.38 greater than it was at that time" (Ex. V. 2, pp. 611, 612).

This Kentucky Wagon Company loan was at this time a very serious matter. The bank only had $368,588.83 in undivided profits at this time (Ex. V. 2, p. 572). The requirement of a substantial charge-off on Kentucky Wagon would have depleted the undivided profits and presented a bank statement with an impaired capital structure. The practice, which the bank had persisted in, in spite of the Bank Examiners' warnings, of charging off $100,000.00 in a six months' period and in the same period making additional loans of more than $200,000.00, was really hard to believe. The Bank Examiner discussed this and all other criticized assets with the officers of the bank. To save the situation the bank officials told the Examiner that, if he would waive the required and necessary charge-offs at this examination, a great holding company with new capital would be immediately organized to take Kentucky Wagon and all the other dead wood out of the bank. It is all in writing in the National Bank Examiner's May 25, 1929, report, wherein it is stated:

> "Your examiner feels that the realizable value of this asset is so uncertain that the management of the bank should continue to make some substantial charges

to Profit and Loss on account of it. The matter was discussed at some length at an officers' meeting. Your examiner was advised that a plan is in contemplation whereby a sort of a finance and holding company will be organized with a large capital stock, say twenty million dollars.

"The holding company will hold, among other things, the stock of the National Bank of Kentucky and its affiliated bank through a surrender and exchange of stock of the bank for stock of the company on some satisfactory basis. It is also contemplated that the holding company will acquire, and through a term of years work out, certain assets of the bank, among others probably Kentucky Wagon Manufacturing Company. In view of the contemplated organization of the holding company, your examiner was requested to waive any charge to Profit and Loss at this time on account of the Kentucky Wagon Manufacturing Company loan. Your examiner suggested that the matter might be deferred until the next examination, provided the management of the bank would agree that if the Kentucky Wagon Manufacturing Company loan is not removed from the bank by the time of the next examination, a charge of $200,000.00 to Profit and Loss would be made on the loan. It later developed that the proposed plan of consolidation is likely to be consummated at an early date, hence the matter of charge off was dropped" (Ex. V. 2, p. 612).

As to losses generally the report states:

"The matter was discussed in meeting of officers. It was also discussed in a conference with President Brown. It is expected that the bank will be functioning as a State institution within ninety days. In view of this fact, the management requested that the matter of 'charging off' losses be waived" (Ex. V. 2, p. 650).

The examination was concluded June 15, 1929.

The minutes of the Board of Directors of the bank of June 7, 1929, recite:

> "Mr. Brown's proposition to form a new Company with a proposed capital of $20,000,000 organized to own stock of other corporations, all, or any part, buy and sell securities, original and refinancing, etc., was submitted to the Board of Directors and the Board expressed themselves as favorable and on motion duly seconded and unanimously carried the President was authorized to proceed along the lines outlined" (Ex. V. 2, p. 992).

After the Bank Examiner left the bank, the Board of Directors on June 21, 1929, adopted the following resolution:

> "RESOLVED, that it is the sense of this Board that a corporation of the character as outlined by the President at this meeting be formed.
>
> "RESOLVED, further, that the President be and he is hereby requested to report to the Board such details as may be necessary in connection with the organization of said corporation, together with his recommendations in regard to all matters connected therewith" (Ex. V. 2, p. 994).

At the examination completed six days before this resolution was adopted, the "criticized" loans were classified by the Examiner, as follows:

"Overdue Class A"	$1,469,771.83
"Overdue Class B"	753,042.28
"Slow"	5,119,417.92
"Doubtful"	742,521.00
"Loss"	43,276.91

(Ex. V. 2, p. 628.)

6. BancoKentucky Organized in July, 1929

During the national bank examination, May 25th to June 15th, 1929, it became obvious to the officers and directors of the National Bank of Kentucky that its collapse

was inevitable unless drastic measures were immediately taken. Its undivided profits were not sufficient to absorb the charge-offs which good banking dictated. It could not collect the criticized bad loans. Brown, the President, was insolvent, as evidenced by his subsequent voluntary petition in bankruptcy.

Kentucky Wagon was a hopeless mess, the bank losing eventually $2,330,204.02, thereon; of which $650,000.00 had been "charged off." $339,729.64 was loaned after the examination under discussion (Ex. V. 5, p. 2127). At the same time that the bank was charging off as bad a part of the Kentucky Wagon loan, it was also making new advances. Murray Rubber loans were proportionately bad; the bank taking a loss of $1,352,976.51 thereon (Ex. V. 5, pp. 2127, 2135). The ultimate losses on other large criticized assets were: Campbell, $842,216.06; Consolidated Realty, $419,043.70; E. B. Norman, $706,709.36. The total amount of losses which the bank suffered as the result of the loans specifically criticized by the bank examiners in the May 25, 1929, examination alone amounted to $7,620,967.92 (Ex. V. 5, pp. 2122 to 2136).

The officers of the bank certainly knew these conditions. If the directors did not know, it was their duty to know. The public evidently sensed the situation. Otherwise, why the enormous decline in deposits? During the same period there was a marked increase in deposits in the other banks in Louisville (R. 3, p. 113).

Knowing the precarious condition of the National Bank of Kentucky as well as, or better than, the Bank Examiner knew it; realizing that the bank was doomed unless a radical change could be brought about in its affairs, the officers, directors, and stockholders of the bank agreed to organize a great holding company, with new capital, and promised with such new capital to take Kentucky Wagon and other criticized assets out of the bank on condition

that the Bank Examiner would not require any further charge-offs at that time. And thus BancoKentucky Company, at a directors' meeting of the National Bank of Kentucky as set forth in their minutes, was first promoted.

So, therefore, even before the Bank Examiner had left the bank the organization of Banco was set afoot. There was no other alternative because the Examiner had warned that unless the Kentucky Wagon Manufacturing Company loan was removed from the bank by the time of the next examination, a charge of $200,000.00 to profit and loss would be made on the loan (Ex. V. 2, p. 612). If such a charge-off had been made at that time, the bank would have been virtually without an undivided profit account.

The organization of BancoKentucky Company followed very quickly. It was incorporated in Delaware on July 16th, 1929, authorized to issue two million shares at ten dollars each (Ex. V. 3, p. 1051). Its prospectus, signed by National Bank of Kentucky, and its "unified" state bank, Louisville Trust Company, and their identical directors, was sent to each shareholder of the unified banks (Ex. V. 3, p. 1139). For convenience this prospectus is reprinted in full as an appendix to this brief. It stated that:

> "the two banks, and the business conducted by them, should be reorganized by adding to this group a third corporation, which will make the operation of these banking institutions more profitable, expand their facilities, and thus develop for the entire group new and profitable financial opportunities and connections."

And provided that:

> "It is an essential part of this reorganization that the shares of this corporation (or at least a substantial majority thereof) be owned by the Trustees Participation Shareholders, and that it be managed and operated by the Board of Directors and the officers of the two banks" (Ex. V. 3, pp. 1140-1141).

The "two banks" referred to were National Bank of Kentucky and Louisville Trust Company.

It was also a prerequisite part of the plan that Banco-Kentucky hold at least a majority of the stock of the National Bank of Kentucky and Louisville Trust Company.

This prospectus offered the "entire capital stock" of BancoKentucky to the shareholders of the two banks; two shares for each Trustees' Participation Certificate, and the remainder at twenty-five dollars per share. Substantially all the certificate holders made the exchange (R. 2, p. 93). The plan was so arranged that no tax liability would be imposed on the exchange. The creation of the holding company was described as a "reorganization" (Ex. V. 3, p. 1140). It was "at once seen that the taxable gain would be very large" (Ex. V. 3, p. 1145) unless this was so, and the organizers took every step so that the exchange of bank stock for holding company stock would be "made to appear (so far as the Bank's stockholders are concerned) as a mere receipt of the same property in another form, and not as a closed transaction wherein they part with one species of property in exchange for an entirely different species of property" (Ex. V. 3, p. 1157).

The organizers "distinctly provided" in the Articles of Incorporation of BancoKentucky Company and on its certificates of stock that it was fully paid and non-assessable (Ex. V. 4, p. 1703; Ex. V. 3, p. 1449). A letter from Bean, President of the Louisville Trust Company, to Brown, President of the National Bank of Kentucky, written July 26, 1929 (Ex. V. 3, p. 1264), explains what the scheme was by this. It states:

> "Does the 'double liability' apply to BancoKentucky stock as it does to stock in the banks? NO; one of the advantages of transferring your bank stock for

> BancoKentucky Company stock is that you are relieved of the double liability clause which applies under the Kentucky law."

Hayes, a vice-president of the National Bank, in urging stockholders to exchange bank stock for Banco stock, stated:

> ". . . our new money is to be used chiefly for buying controlling interest in banks. . . . The new stock will be in just as safe a position, as I see it, as the old, and without double liability . . ." (Ex. V. 3, p. 1398).

and again:

> ". . . it does not have the double liability to the holders as bank shares have" (Ex. V. 3, p. 1400).

Substantially all the bank stockholders exchanged for BancoKentucky stock (Ex. V. 4, p. 1942). A great many, also, in response to a regular promotion campaign put on by the banks and aided by loans made by the National Bank of Kentucky amounting to more than five million dollars on the sole security of BancoKentucky stock, subscribed for additional shares (Ex. V. 4, p. 1934). Although the prospectus provided that the BancoKentucky Company "offers to the Trustees' Participation shareholders . . . its entire capital stock" some subscriptions were accepted from non-stockholders. Subscriptions were called for payment on October 1st, at which time nearly ten million dollars in cash came into the treasury of BancoKentucky Company (Ex. V. 3, p. 1144; Ex. V. 4, p. 1934). However, instead of utilizing this new money to clean up the National Bank of Kentucky, as promised to the Bank Examiners, it was paid out almost immediately to purchase the controlling stock in banks (Ex. V. 3, pp. 1073-1075). During the short period that Banco was in existence it acquired the following bank stocks through exchange of its stock and for cash (Ex. V. 4, p. 1914).

Number of Bank Shares Held by Banco	Name of Bank	Percentage of Stock Held by Banco.
38,000 out of 40,000	National Bank of Kentucky, Louisville	95%
16,625 out of 17,500	Louisville Trust Co.	95%[1]
47,854 out of 60,000	Pearl Market Bank & Trust Co., Cincinnati, O.	80%
44,290 out of 50,000	Brighton Bk. & Trust Co.	89%
548 out of 600	Central Sav. Bk., Covington, Ky.	91%[1]
2,099 out of 6,500	Peoples Liberty Bk. & Tr. Co., Covington, Ky.	32%
6,925 out of 7,500	First National Bank, Paducah, Ky.	92%
7,125 out of 8,000	Ashland National Bk., Ashland, Ky.	89%
2,713 out of 3,000	Security Bank, Louisville, Ky.	90%[1]
575 out of 1,000	Mechanic's Tr. & Sav. Bk., Paducah, Ky.	58%[1]

In exactly thirty-five days after it commenced business its available cash was gone and it was borrowing money (Ex. V. 3, p. 1553).

BancoKentucky Company began its actual business existence in October, 1929. It failed ingloriously in November, 1930, with no substantial assets except bank stock and most of these banks became insolvent at the same time (Ex. V. 5, pp. 2099 to 2108). BancoKentucky, as its name significantly indicates, was a bank stock holding company pure and simple. It was a creature born out of a resolution adopted by the Board of Directors of the National Bank of Kentucky (Ex. V. 2, p. 994).

Its President, and Secretary-Treasurer, were President and Cashier respectively of the National Bank of Ken-

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[1] Over 50 per cent and therefore "an act in violation of the prohibitory provision in Section 609" (Ky. Stat.) *BancoKentucky's Receiver* v. *Louisville Trust Co.'s Receiver*, 263 Ky. 155, 92 S. W. (2d) 19 (1936). Attorney-director Helm testified "The Newport and Covington, Kentucky, banks were both state banks. We were counting on non-action by the State Banking Commissioner and the Attorney General to enforce this provision (Ky. Stat. 609)." (R. 3, p. 92.)

tucky (R. 2, p. 238). Its directors and National Bank of Kentucky's directors were the same individuals, who were also the directors of the Louisville Trust Company (R. 2, p. 238). The same group of men, acting as directors of the two banks and the holding company consistently had three board meetings all at the same time (R. 2, pp. 251, 252).

BancoKentucky Company did not have a single paid employee at any time. It never paid a dollar in salary or wages to anyone. It had no office, office furniture or equipment. It did not even have a telephone (R. 2, pp. 237, 280, 281, 282; R. 3, p. 155). It only had three small record books: cash journal, ledger, and security record (Ex. V. 3, pp. 1497 to 1574; V. 4, pp. 1575 to 1675), and these were all kept by and in the desk of the Cashier of the bank (R. 2, p. 282). It did not have a correspondence file. Letters sent and received by it were commingled in the files of National Bank of Kentucky. Though it was a Delaware corporation it never qualified to do business in Kentucky (Ky. Stat. Sec. 571), (Ex. V. 4, p. 1694; R. 2, pp. 52, 102).

BancoKentucky was listed on all the stock exchanges as a bank stock holding company (Ex. V. 4, pp. 1695, 1713, 1717, 1723, 1829). All the newspapers carried its market quotations under the heading of Bank stock (Ex. V. 3, pp. 1181, 1183, 1189).

7. Business Conducted by Banco Exclusively a Holding Company Business

It has been previously stated that BancoKentucky only had three small record books. All the entries in these books have been reproduced in full as exhibits in this case (Ex. V. 3, pp. 1497 to 1574; V. 4, pp. 1575 to 1675). It is not a tedious task to examine and analyze every different business transaction undertaken by Banco during the short year of its existence. These business transactions, and there were no others, were as follows:

(1) It exchanged its shares for National Bank of Kentucky and Louisville Trust Company shares.

(2) It sold its own shares for cash, $9,869,650.00. Over $7,000,000.00 of this came out of the "unified" banks on loans made on the security of Banco stock.

(3) For cash and exchange of its stock it acquired the controlling stock interest in seven other banks in Kentucky and Ohio; and a minority stock interest in another bank.

(4) It collected dividends, $1,180,858.50, on its bank stocks and paid out, on the same day, dividends ($1,253,513.00) on its own stock. The deficit was met by overdraft at National Bank of Kentucky.

(5) It invested $25,000.00 in 625 shares of Union Central Life Insurance Company stock.

(6) In a vain attempt to peg the stock market on Banco-Kentucky stock it repurchased and cancelled 106,000 shares of its own shares at a cost of $2,374,137.50.

(7) It collected a small amount of interest on its bank deposit.

(8) Brown, President of the Bank and Banco, without authority or knowledge of the Board of Directors, borrowed (?) two million dollars of its funds and substituted his note for that amount therefor.

(9) Shortly before its failure Brown made an unauthorized deal for a sort of a partnership with Caldwell & Company, which was never consummated.

(10) Less than thirty days before the bank's failure Banco purchased, out of the portfolio of the National Bank of Kentucky, the worthless Murray Rubber Company notes of $580,000.00 and the $20,000.00 note of Lewis C. Humphrey. This was done

in a futile last-minute attempt to clean up the National Bank of Kentucky and avert its collapse. This transaction was later rescinded by the courts.

(11) It borrowed from Chemical National of New York \$1,000,000.00, pledging some of its bank stocks as collateral, at a time when it was using its funds to support the market on its own stock.

(12) It borrowed another \$600,000.00 from Chemical shortly before the failure, the proceeds from which were used to purchase the worthless Murray Rubber and Humphrey notes from the National Bank of Kentucky.

Aside from such inconsequential business transactions as paying its organization, printing, and other similar expenses, stock listing and transfer fees, postage, income tax, and the like, the above mentioned matters comprise every business transaction ever conducted by Banco-Kentucky Company up to the time of its failure (Ex. V. 4, p. 1914).

Every one of the above mentioned transactions were connected directly with and in furtherance of its interest in the stocks which it held in the National Bank of Kentucky, and the other nine banks, except the purchase of "an infinitesimal amount" of stock (R. 3, p. 167) in the Union Central Life Insurance Company for \$25,000.00. This represented less than one-tenth of one percent of its total investments (Ex. V. 4, p. 1739). It is not difficult to surmise that this was done to attract bank deposits; and if so, even it was in furtherance of the bank stock holding company business.

The appropriation by Brown of two million dollars of Banco's funds, and the substitution of his note therefor, was unauthorized and therefore not a business transaction of Banco. If it be considered a transaction of Banco, it

was done in furtherance of the interest of the bank because the funds in part went immediately to reduce the much criticized Brown and Wakefield notes in the National Bank of Kentucky.

The Caldwell transaction above was never consummated (R. 1, p. 262). It amounted to an attempt only, was not consummated, and cannot be considered a transaction at all. The Caldwell deal was clearly a last-minute attempt to rescue the fast sinking National Bank of Kentucky, and extend the bank-stock holding company business.

The Murray Rubber and the Humphrey transactions were later rescinded by the courts. *BancoKentucky Company's Receiver* v. *National Bank of Kentucky's Receiver,* 281 Ky. 784, 137 S. W. (2nd) 357. The transaction was a direct attempt to aid National Bank of Kentucky and protect the stockholders' keystone bank.

The "declared" purposes of BancoKentucky, set forth in its articles of incorporation, undoubtedly permitted it to engage in a wide variety of business enterprises aside from the holding of the bank stocks. It engaged, however, only in the business of holding bank stocks. The written record makes this all crystal clear. The President and Secretary of BancoKentucky Company certainly knew what the real purpose and business of BancoKentucky Company was. On September 26, 1929, just as the company was starting business, it made application to list its shares on the Chicago Stock Exchange. As is customary, it filed a sworn written application. This application states that Banco was incorporated "for the purpose of owning controlling interest in state and national banks located primarily in Kentucky, Ohio and Indiana." And "it is the intent of the management to employ its cash for acquiring additional banks" (Ex. V. 4, p. 1723). A letter of the Secretary of Banco, addressed to the Chicago Stock Exchange, March 19, 1930 (Ex. V. 4, p. 1711) reads in part:

"This is to state that the BancoKentucky Company is a holding company for capital stock of banks and trust companies, of which it owns a majority of stock or a controlling interest."

And in a questionnaire filed with the Chicago Stock Exchange, signed by the Secretary of Banco, it is stated (Ex. V. 4, p. 1713):

"(b) *Primary Purpose:* To acquire, control and operate banks and trust companies.

"(c) Nature of Business: This company has not engaged in the business of investing and reinvesting in a diversified list of securities of other corporations for revenue and profit, but has limited its activities to acquiring control of banks and trust companies and the operation of same."

8. Banco One of Many Plans Suggested as a Means of Avoiding Charge-Off of Bad Loans

The condition of National Bank of Kentucky was precarious when BancoKentucky was formed. Its condition gradually became worse after Banco was organized. We have heretofore shown in detail, at periods prior to the organization of Banco and from the Bank's own records, the conditions which brought about its eventual collapse. Details such as declining deposits, failure to maintain its legal reserve requirements, heavy borrowings, excessive overdrafts, illegal loans, large charge-offs and millions of sub-standard assets classed as slow and doubtful, alone tell the story. But if one examines more deeply into the details of the record before this Court, he comes to the inevitable conclusion that "unification" with Louisville Trust and the organization of Banco were simply two of several schemes to clean up National Bank of Kentucky and to restore it to a position of confidence in the community. It could not charge down the Kentucky Wagon, Murray Rubber, Wakefield, Campbell, and Herald Post loans to their

real values without a serious impairment of its capital structure.

Its officers made promises of every kind to the bank examiners as to these loans in order that it would not be required to make the necessary charge-offs. In 1928 they said they were going to sell Kentucky Wagon to the French Government at a price that would pay off the loan (Ex. V. 2, p. 518). In the following year to prevent a charge-off on Kentucky Wagon, they promised the examiner that they would form the holding company, Banco, and that Banco would take Kentucky Wagon and other bad loans out of the Bank (Ex. V. 2, p. 612).

In the year in which Banco was formed they again escaped a charge-off on Kentucky Wagon upon the promise that they intended to denationalize the National Bank of Kentucky and make it a state bank (Ex. V. 2, p. 650). They actually went so far as to incorporate a state bank with the name "Bank of Kentucky" (Ex. V. 3, p. 1187), but found that they could not denationalize; the Federal Reserve Bank would not admit the proposed new state bank to membership because it had about four million dollars in sub-standard loans (Ex. V. 3, p. 1479).

At the time of the spring examination in 1930 they worked up a scheme to go into partnership with Caldwell & Company and its chain of banks. A few months after this deal was contemplated, Caldwell failed for untold millions and his creditors received about one-half of one per cent in dividends—two broken financial houses going into partnership to restore themselves to solvency.

These stockholders did have one chance to save National Bank of Kentucky and that was by complying with the promise that they made to the bank examiner when Banco was organized; that they would put new money into Banco, and that they would take this new money and clean up the National Bank of Kentucky, but instead of doing

this they resorted to the grandiose scheme of acquiring a whole chain of banks on both sides of the Ohio River.

Each time the national bank examiner came into the National Bank of Kentucky they had a new scheme, always in futuro, to take the dead wood out of National Bank of Kentucky. Even at the time of the last examination of National Bank of Kentucky, September 17 to October 24, 1930, less than a month before the failure, they had new proposals as shown in a letter, signed by the directors, to the Comptroller of the Currency. These never materialized. (See letter dated October 24, 1930, Ex. V. 2, pp. 985, 986.)

The inevitable end of the road came in November, 1930. Caldwell's failure, a few days before, did not cause the failure of National Bank of Kentucky. Its stockholders and their agents, the officers and directors, are responsible. Its failure certainly cannot be laid on the doorstep of the depositors.

9. Bank Shareholders Continued to Manage Bank After the Exchange, and Received the Same Dividends

The prospectus provided:

> "It is an essential part of this organization that the shares of this corporation (or at least a substantial majority thereof) be owned by the Trustees' Participation Shareholders, and *that it be managed and operated by the Boards of Directors and the officers of the two banks.*"

The plan was not only conditioned "upon the acquisition by the trustees participation shareholders . . . of at least a majority of the shares of the BancoKentucky Company" but it was "further conditioned upon the acquisition by the BancoKentucky Company of . . . a majority of the trustees participation shares" (Ex. V. 3, p. 1140A). This plan was carried into effect. During Banco's entire exist-

ence its directorate and the unified banks' directorates were identical (R. 2, p. 238). Although Banco acquired other banks, no representative of those banks was admitted to Banco's board. Control over the holding company was vested from the start and continuously in the respondents (Ex. V. 4, pp. 1917 to 1920). On the other hand, Banco placed its representatives on the boards of the various outlying banks which it acquired. Consequently, the respondents continued their control over the National Bank of Kentucky and added to this a control over other banks. Brown was elected director of all the banks which were acquired (Ex. V. 4, p. 1858), a situation which was criticized by the Bank Examiners as being in violation of law (Ex. V. 2, p. 870). Qualifying shares of the stock in the acquired banks were furnished to those of the directors of the acquired banks who, in addition to Brown, were to represent Banco (Ex. V. 3, p. 1099; Ex. V. 4, pp. 1797, 1798, 1822-1825). Dividends on qualifying shares were returned to Banco. Directors so qualified endorsed their qualifying shares and returned them to Banco (Ex. V. 4, pp. 1799, 1801, 1809, 1812-1824).

The original shareholders of the Bank continued their control of the Bank and of the holding company not only through the same Board, but through the holding company's officers. Banco's president and secretary-treasurer were president and cashier, respectively, of National Bank of Kentucky (Ex. V. 3, pp. 1063, 1099), Substantially all of the shareholders of the Bank became shareholders of Banco (Ex. V. 4, p. 1942). Banco, in turn, acquired ninety-five per cent of the Bank stock (R. 2, p. 94). All persons recognized that neither the control nor interest of the Bank shareholders was changing and in order to avoid a taxable gain the plans were made so that those exchanging would merely be accepting "receipt of the same property in another form" (Ex. V. 3, p. 1157).

At the time both the Bank and Banco failed sixty-seven (66.68%) per cent (Ex. V. 5, p. 2152) of all of Banco's outstanding stock was held by individuals who had been shareholders of the National Bank of Kentucky. The original arrangement that a substantial majority of the stock of the holding company "be owned by the trustees participation shareholders" was continued to the end. Actually, at the time of failure almost ninety (88.71%) per cent of Banco's shareholders were persons who had acquired Banco stock by exchange of trustees' participation certificates or interim receipts, which represented trustees' participation certificates, by subscription to the "plan of reorganization" which set out the fact that under the plan trustees' participation shareholders should manage the holding company, or by exchange of shares of the other banks which Banco acquired (R. 2, pp. 127, 128).

Not only did the shareholders of the Bank continue their control, they continued to receive exactly the same dividends which they had received before the exchange. The amount received and the date on which the dividend was received was exactly the same as though the respondents had continued in the original arrangement and had not organized the holding company (Ex. V. 4, pp. 1692, 1917 to 1920).

National Bank of Kentucky paid dividends of $160,-000.00 each quarter, equal to $16.00 per share per year on its capital stock, to BancoKentucky which distributed the exact amount to its shareholders on the very same day it was received from the bank (R. 2, p. 101). From its organization until its failure, little more than a year, Banco-Kentucky's only income, except for $3,457.40, was from its controlled banks (Ex. V. 4, p. 1689). During its existence it collected $1,180,858.50 dividends from its bank stocks and paid $1,253,513.00 to its stockholders. The money to pay the deficit was met by overdraft on the National Bank of Kentucky (R. 2, p. 122).

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decision of the District Court.

2. The Circuit Court of Appeals erred in holding that the respondents could shield themselves behind the corporate entity of BancoKentucky and avoid stock assessment in this matter.

ARGUMENT

Regardless of "Record" Ownership, the "Real" or "Beneficial" Owner Is Liable for Assessment

The idea of a bank-stock holding company originated, or at least assumed serious proportions, in the high finance days of 1911. It was then proposed in New York to form a giant bank-stock holding company to buy up, through exchange of holding company shares for bank shares, a great many banks, national and state, throughout the nation. Had the effort received governmental sanction, and succeeded, a few great holding companies might soon have controlled all the banks in the United States. The President saw the danger and called upon the Solicitor General for an opinion on the matter. In the opinion, Solicitor General Lehmann said:

> "If many enterprises and many banks are brought and bound together in the nexus of a great holding corporation, the failure of one may involve all in a common disaster."

And he concluded that a holding company

> "in its holdings of National Bank stock is in usurpation of Federal authority and in violation of the Federal law." Congressional Record, May 10, 1932, page ~~10212~~. 9899 - 9904.

What the Solicitor General prophesied came true at Louisville with its BancoKentucky; in Michigan with its Detroit Bankers Company and its Guardian Detroit Union Group, Inc. The stockholders of these Detroit bank-stock

holding companies were held liable for the national bank assessments. *Barbour* v. *Thomas,* 86 F. (2d) 510; cert. den. 300 U. S. 670. Fortunately for the nation, it did not happen in the northwest with its Northwest Bank Corporation, or in the far west with its giant Bank America Corporation.

Banco, just like Detroit Bankers and Guardian Detroit Group, was a promotion by the owners of the bank. It was promoted, not to let them go out of the banking business, but to continue and enlarge their investment therein, and increase their opportunity to profit thereby. They "distinctly provided" in the articles of incorporation of Banco and on its certificates of stock that it was "fully paid and non-assessable." What did they intend by this except to escape the assessment liability? The answer to the question will be found in the letter of Bean, President of the Trust Company, to Brown, President of the bank, written July 26, 1929 (Ex. 27, p. 1262), which states:

> "Does the 'double liability' apply to BancoKentucky Company stock as it does to stock in the banks? NO; one of the advantages of transferring your bank stock for BancoKentucky Company stock is that you are relieved of the double liability clause which applies under the Kentucky law."

Title 12 U. S. C. 63 provides:

> "The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. . . ."

This Court has consistently held that:

> ". . . they (owners of national bank stock) cannot enjoy the benefits accruing to shareholders, and escape liability for the contracts, debts and engagements of

the bank." (Parenthetical addition ours.) *Christopher v. Norvell*, 201 U. S. 216, 229 (1906).

The decisions from the earliest cases involving stock assessment liability adhere to and extend the principle that technicalities, subterfuges, record ownerships, and transfers will be disregarded in order to discover the real, true and beneficial owner of the bank shares and hold him liable for the assessment.

> "As to such owners (real owners) the law looks through subterfuges and apparent ownership and fastens the liability upon the shareholder to whom the shares really belong." (Parenthetical addition ours.) *Ohio Valley National Bank* v. *Hulitt, Receiver*, 204 U. S. 162, 168 (1907).

The transferor has been held to be liable as actual owner where transfer of stock was made to a financially irresponsible person for the purpose of evading assessment and where the transferor continued to be the true owner. *National Bank* v. *Case*, 99 U. S. 628 (1878). The same rule was followed in *Bowden* v. *Johnson*, 107 U. S. 251 (1882), and amplified in *Stuart* v. *Hayden*, 169 U. S. 1 (1897); *McDonald* v. *Dewey*, 202 U. S. 510 (1906); *Pauly* v. *State Loan*, 165 U. S. 606 (1897); *Ohio Valley National Bank* v. *Hulitt*, 204 U. S. 162 (1907).

Where the stock was transferred to a minor child who could not respond to assessment, this Court has held the transferor liable. *Early* v. *Richardson*, 280 U. S. 496 (1930).

In cases where the stock was transferred to a trustee for the purpose of taking advantage of the statute which provides that the trustee shall only be liable to the extent of trust assets in his possession, 12 U. S. C. 66, it was held that the beneficial and real owner would be liable. *English* v. *Gamble*, 26 F. (2d) 28 (C. C. A. 8, 1928); *O'Keefe* v.

Pearson, 73 F. (2d) 673 (C. C. A. 1, 1934); *Schlener* v. *Davis*, 75 F. (2d) 371 (C. C. A. 5, 1935).

In more recent cases involving the use of a holding corporation as a bulwark against stock assessment, the courts have constantly held that the shareholders of the holding company are liable for assessment. *Corker* v. *Soper*, 53 F. (2d) 190 (C. C. A. 5, 1931), cert. den. *Corker* v. *Howard*, 285 U. S. 540; *Metropolitan Holding Co.* v. *Snyder*, 79 F. (2d) 263 (C. C. A. 8, 1935). The corporate fiction of the holding company was disregarded. *Durrance* v. *Collier*, 81 F. (2d) 4 (C. C. A. 5, 1936); *Brusselback* v. *Cago Corp.*, 85 F. (2d) 20 (C. C. A. 2, 1936), cert. den., 299 U. S. 586; *Nettles* v. *Rhett*, 94 F. (2d) 42 (C. C. A. 4, 1938); *Fors* v. *Farrell*, 271 Mich. 358, 260 N. W. 886 (1935); *Harris Investment Co.* v. *Hood*, 123 Fla. 598, 167 So. 25 (1936); *Nettles* v. *Sottile*, 184 S. C. 1, 191 S. E. 796 (1937); *Hansen* v. *Agnew*, 195 Wash. 354, 80 P. (2d) 845 (1938).

In every case before this Court since the statute was adopted the rule expressed in *Pauly* v. *State Loan and Trust Co.*, 165 U. S. 606 (1897), has been followed. That rule is:

> "That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151 (165 U. S. 619).
>
> "The courts will look at the relations of parties as they actually are, or as, by reason of their conduct, they must be assumed to be for the protection of creditors. Congress did not say that those only should be regarded as shareholders, liable for the contracts, debts and engagements of the banking association, whose names appear on the stock list distinctly as shareholders. . . . As already indicated, those may be treated as shareholders, within the meaning of section 5151, who are the real owners of the stock, or who hold

themselves out, or allow themselves to be held out, as owners in such way and under such circumstances, as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not, in fact, owners." (165 U. S. 623.)

In *Ohio Valley National Bank* v. *Hulitt*, 204 U. S. 162 (1907), this Court restated the rule.

> ". . . the law looks through subterfuges and apparent ownerships and fastens the liability upon the shareholder to whom the shares really belong." (204 U. S. 168.)

A corporate entity will be disregarded when necessary to avoid a fraud or to prevent an evasion of a statute. Wormser, "The Disregard of Corporate Fiction," pp. 36, 44, 51, 59.

This rule has been followed by this Court when to give sanctity to the corporate entity would result in circumventing a statute enacted for the protection of the public. *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904); *United States* v. *Lehigh Valley Railway Co.*, 220 U. S. 257 (1911); *United States* v. *Delaware L. & W. Railway Co.*, 238 U. S. 516 (1915).

In *C. M. & St. P. Ry. Co.* v. *Minneapolis Civic and Commerce Association*, 247 U. S. 490 (1918), this Court said:

> ". . . the courts will not permit themselves to be blinded or deceived by mere forms of law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." (247 U. S. 501.)

"A dominant or controlling stockholder or group of stockholders" has been recognized as a fiduciary for creditors of the corporation. *Pepper* v. *Litton*, 308 U. S. 295, 306 (1939). In that case the Court pointed to the fact that:

> "The relations of a stockholder to a corporation and to the public require good faith and fair dealing in every transaction between the stockholder and the corporation which may injuriously affect the rights of creditors and the general public, and a careful examination will be made into all such transactions in the interests of creditors." 308 U. S. 309 (footnote 19 quoting from *In re Burntside Lodge, Inc.*, 7 F. Supp. 785).

The respondents organized Banco for the purpose of continuing and extending their interest and control in banks. However, they sought to retain this advantage and at the same time escape the concomitant liability imposed by the assessment statutes. The respondents continued to remain the shareholders of National Bank for the purpose of the statute. Banco was nothing more than "a corporate pocket" (308 U. S. 309) of the bank stockholders.

In giving the transaction the special scrutiny necessary to protect the interests of creditors, it would seem that the form should be disregarded and effect should be given to the spirit of the law. This is especially so because Banco was organized at a time when the Bank's condition was precarious.

Respondents refer to Banco's unlimited powers, as set out in its purpose clause, as a defense to the present claim. Banco's actual purpose, however, was reported to the state of its incorporation in its annual report. The nature of Banco's business was there described:

> "TO ACQUIRE, CONTROL AND OPERATE BANKS AND/OR TRUST COMPANIES" (Ex. V. 4, p. 1921-a).

In other public announcements such as the application for stock listing with the Chicago Exchange (Ex. V. 4,

p. 1717); the application for listing on the Louisville Exchange (Ex. V. 4, p. 1695); brokerage circulars (Ex. V. 5, pp. 2087-2090); correspondence (Ex. V. 4, p. 1711) and general publicity it was so described.

In *Central Life Securities Co.* v. *Smith,* 236 Fed. 170, C. C. A. 7 (1916), the Court pointed out:

> "While the Central Life Securities Co. was authorized to conduct various kinds of business, its chief business, as advertised and as actually conducted, was to secure control of the Republic Life Insurance Company, and thereby indirectly engage in the life insurance business."

The Court held that the corporation was acting unlawfully and was not troubled in arriving at that conclusion by the broad purpose clause.

Nor can the fact that Banco was a Delaware corporation affect the situation. The mere fact that there was incorporated in the charter and in the certificates which Banco issued a phrase that its shares should be non-assessable does not leave the Federal Government without remedy when the receiver of a national bank, an officer of the United States, attempts to enforce a Federal law. Such a contention was disapproved by this Court in the *Northern Securities* case. The Court said:

> "Underlying the argument in behalf of the defendants is the idea that as the Northern Securities Company is a state corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations. This suggestion does not at all impress us." 193 U. S. 197, 332.

And again:

"No State can, by merely creating a corporation, or in any other mode, project its authority into other states, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution. . . ." Ibid., p. 345.

BANK STOCK HOLDING COMPANY CASES

With respect to the Federal Bank Assessment statute, under consideration here, and with respect to similar statutes as to state banks, the courts have been uniform in holding that the stockholder of the bank stock holding company is in law the real stockholder of the bank. Decisions to this effect are found in the United States Circuit Court of Appeals for the Second, Fourth, Fifth, Sixth and Eighth Circuits, and similar decisions have been handed down by the Supreme Courts of several states.

In *Nettles, Recr.*, v. *Rhett*, 94 Fed. (2) 42 (C. C. A. 4), (1938), the court stated the rule as follows (p. 47):

"Even in the absence of a prohibitory statute, it has been quite generally held in recent bank cases under varying circumstances that the stockholder in a company, which holds for them the stock of a bank, are the real beneficial owners of the stock, and, as such, are subject to the assessment when the bank fails, notwithstanding the record ownership or title. This is merely an application of the rule which, before the adoption of the holding company device in banking circles, had announced the liability of the real owner of bank stock, although not registered as such on the bank's books. *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606; *Ohio Valley National Bank* v. *Hulitt*, 204 U. S. 162; and the rule has been recently applied, not only in cases in which an actual intent on the part of the organizers of the holding company to evade an impending statutory liability has been found to exist, as in *Corker* v. *Soper*, 53 F. (2d) 190; *Durrance* v. *Collier*,

81 F. (2d) 4; *Brusselbach* v. *Cago Corp.*, 85 F. (2d) 20; *Harris Investment Co.* v. *Hood*, 123 Fla. 598, 167 So. 25, but also where the holding company was formed for the bona fide purpose of saving the bank or bringing about and controlling an expansion of its business. *Metropolitan Holding Co.* v. *Snyder*, 79 F. (2d) 263; *Barbour* v. *Thomas*, 86 F. (2d) 510; *Fors* v. *Farrell*, 271 Mich. 358, 260 N. W. 886."

* * * *

Banco was organized to "expand" the bank's "facilities." The organizers, however, took care that the former shareholders should control this "expansion of its business."

In setting out the rule of liability of the shareholders of the holding company the Court in the *Nettles* case said:

> "Some of the cases reach this result by resort to the theory that the circumstances justify the ignoring of the corporate entity; *but there seems to be no necessity to adopt this view.* The holding company may be frankly recognized as a convenient instrumentality adopted by the stockholders for legitimate ends (in the absence of a prohibitory statute) without affecting their liability in the case of insolvency to pay again the face value of their stock, just as if it were being held for them by a natural person."

In *Corker* v. *Soper*, 53 Fed. (2d) 190 (C. C. A. 5), cert. denied 285 U. S. 540 (1931), Corker was held liable for stock assessment though he attempted to continue his ownership in the bank by insulating himself from liability by means of placing his stock in Laurens Company. The decision of the District Court, holding Corker liable, was affirmed by the Court of Appeals. That court said (p. 192):

> "Appellant devotes a large portion of his brief to the contention that the Laurens Company was a real corporation, validly organized and validly existing, and that, in view of the frankness with which the pur-

pose to avoid liability was avowed, and the things to accomplish that purpose done, there is no warrant here for disregarding the corporate character of the Laurens Company in order to hold its incorporators liable.

"Appellant's troubles do not arise from the fact that the corporate entity of the Laurens Company has been disregarded. The judgment of the court below fully recognized and gave effect to that entity. It found that, though it did in fact exist, it existed as a mere creature organized and maintained for the purpose of holding, not really, but as agent for appellant, the stock which he caused to be put in its name, that appellant at all times remained the real owner of the shares, and that the law will look through the subterfuge of pretended ownership to fasten liability upon the shareholder to whom, in fact, the shares belong."

The only difference between the *Corker* case and the present suit is the fact that there the holding company only held the stock of one bank and here Banco held the stock of several. This does not serve as a basis for distinction, however. Banco had no substantial assets other than assessable bank stocks. These could not be relied on for the protection of the depositors since failure of one bank would bring and did bring common disaster.

It is true that Banco received $9,800,000.00 in cash ($7,100,000.00 borrowed from bank-trust company) but that cash was used principally to purchase stocks of other banks. Before that cash was received by Banco contracts had been executed to buy two Cincinnati banks.

In *Durrance* v. *Collier*, 81 Fed. (2d) 4 (1936), the Court of Appeals for the same circuit reached the same conclusion.

In *Barbour* v. *Thomas*, 86 Fed. (2d) 510 (1936), cert. denied, 300 U. S. 670 (1937), the Court of Appeals for the Sixth Circuit laid down the rule which we believe should have been adopted in the instant case. The Court said:

"Since the holding company had no substantial assets except the stock of its units, it was manifest that the creditors and depositors of the component banks were offered no real protection either under the federal statute providing for double liability of shareholders (Section 63, Title 12, U. S. C.), or under a statute of the State of Michigan with similar provisions." [86 F. (2d) 513.]

"The stockholders of the banks had no intention of retiring from the banking business. They organized the holding company for the protection and promotion of their common interests. . . . Their primary purpose was to centralize the control and operation of the five unit banks and from time to time acquire control of additional ones by the exchange of holding company stock for other stocks. They were careful to provide that the holding company should be under the exclusive control of officers and agents of the component banks at least until December 31, 1934." [86 F. (2d) 517.]

In attempting to distinguish the present situation from the *Detroit* case the Court of Appeals commented that in that case

"The only assets of the holding company upon its organization were the bank stocks transferred to it by constituent units, in exchange for its stock, and '$1200 received from 120 "trustee shares" of no par value' . . ." (R. 319).

This statement only serves as a distinction in the amount of cash held by the two holding companies at the time of their organization. This difference is an illusory one. Banco's cash came from the Bank and the Trust Company as a result of loans made by those two institutions to individuals who were buying Banco stock. That cash when paid into Banco was dedicated to the purpose of acquisition of additional banks. The subscribers for Banco stock

were not required to pay their subscriptions until October 1, 1929 (Ex. V. 3, p. 1144). Prior to that time, on September 25, 1929, Banco had made a contract to purchase stocks of other banks which would use up practically all of that cash, and plans were under discussion for the purchase of banking institutions in addition to those already contracted for (Ex. V. 3, pp. 1073 to 1075).

It is submitted that there is no distinction between the instant case and the *Detroit* case. Both of the holding companies "possessed no substantial assets, except the stock of its component banks" (R. 320). In such a situation the Court of Appeals recognized that

> "Creditors and depositors . . . were afforded no real protection . . . under the federal statute imposing double liability." (R. 320.)

In attempting to base a distinction between the present case and the *Barbour* case on the amount of cash paid into the holding company "upon its organization," it is submitted that the Court of Appeals overlooked certain factors which were present in the Detroit bank assessment cases. *Deming* v. *Schram*, 7 F. Supp. 271, was a companion suit to *Barbour* v. *Thomas*. There the stockholders of the holding company, held liable for the assessment, paid in cash in excess of $7,500,000 for the purchase of additional shares of the holding company (Ex. V. 5, p. 2181). Paying cash for stock of the holding company did not relieve the stockholders of The Peoples Investment Corporation or other bank holding companies. As the Court of Appeals for the Fourth Circuit said:

> "It is of no moment that some of the preferred stockholders acquired their shares for cash and did not previously own stock of the bank. They became none the less the real parties in interest in the Peoples State Bank. . . ." *Nettles* v. *Rhett*, 94 F. (2d) 42, 49.

It is further submitted that the Court of Appeals overlooked factors involved in the *Barbour* case, itself, in attempting to base a distinction on this ground between the present suit and the *Barbour* case. In the *Barbour* case the Court pointed out that,

> "Ninety-one and three-tenths per cent of appellants were . . . owners of their holding company stock by original exchange, one-half of one per cent obtained their stock in exchange for the stock of others of subsequently acquired institutions. The remainder obtained their certificates in other ways." *Barbour v. Thomas*, 86 F. (2d) 510, 516.

The Detroit holding company stock was listed on the stock exchange and some of the 8% above mentioned acquired their stock through the exchange for cash (Ex. 126, record *Barbour v. Thomas*, No. 718, October Term, 1936, on file with the Clerk of this Court). This did not prevent them from being held liable as the real and actual shareholders of the First National Bank-Detroit.

The Court of Appeals also points out that the Detroit shareholders "assumed its statutory liability as record holder of the bank stocks" (R. 320). However, the Court itself states that this point "while being worthy of evaluation was not considered controlling." It was laid "to one side"[4] in the decision holding the Detroit shareholders liable. It cannot serve as a distinguishing point. This is particularly so when the condition of the Bank as of the time the clause was written into Banco's charter is borne in mind.

Neither the fact that some of Banco's stock was sold to the general public nor the illusory accumulation of cash, nor the placing of the statement of limitation on liability in the charter can serve to distinguish the present case from the action holding the Detroit shareholders liable. Nor can Banco's purchase of stock in an insurance company

(one-tenth of one per cent of its total assets), nor its belated acquisition of the Murray Rubber and Lewis Humphrey obligations [amounting to one and one-half per cent of its total assets, never brought before its Board of Directors and rescinded by the Court after its collapse—*BancoKentucky's Receiver* v. *National Bank of Kentucky's Receiver*, 281 Ky. 784, 137 S. W. (2d) 357 (1939); nor the unauthorized personal loan to Brown; nor the unconsummated Caldwell transaction, serve to distinguish the present case from that in Detroit. It is submitted that the Court of Appeals should have applied the rule it laid down in the *Barbour* case.

In *Metropolitan Holding Co.* v. *Snyder*, 79 Fed. (2d) 263 (C. C. A. 8, 1935), the Court said (p. 268):

> "The incorporators of the holding company may have acted in good faith according to their standards of right, but under the facts in this case, as disclosed by the record, they must be judged by the legal effect of what they deliberately did. If they were the beneficial owners of the shares in question and the corporation was merely an instrumentality set up for their own convenience in holding the title to the shares, then in equity it matters not what design, good or evil, prompted their actions; from either source, the effects of their actions—the avoidance of a statutory liability—are the same."

The claim was made that the holding company became the actual owner of the bank stock and that the defendants were only its stockholders. The Court said that the provision of the National Bank Act for assessment liability was (page 266):

> ". . . enacted primarily for the benefit of the creditors of national banking associations. The so-called double liability of shares of national bank stock prompts the public to select banks of this character with which to

do business in preference to other institutions which do not have this additional stock liability. If the contentions of the appellants are correct, then the organization of this holding company had the effect of circumventing Section 5151, Rev. St. The ownership of this 720 shares of stock carried with it the responsibility of this additional liability, and to say that the individual appellants by their own initiative could take the title to this block of stock from the Vandeventer Securities Company and practically suspend this statutory liability by placing title in a corporation, the only asset of which, at the time, or ever to be, was this block of stock, would be to render the provisions of this statute a complete nullity for all practical purposes. *To deprive the creditors of a national bank of their statutory protection by such a method is wrong and the courts will not countenance the interposition of a mere corporate shadow to conceal who are the actual and beneficial owners of bank shares. To permit individuals to circumvent the contingent liability under this statute by simply organizing a corporation for the purpose of holding shares would set up a device against which the statute would ever afterwards be ineffective.*"

In *Brusselback* v. *Cago Corporation*, 85 Fed. (2d) 20—cert. denied, 299 U. S. 586 (1936), the Court held (p. 23):

"Appellee Fox is the president of Cago Corporation, Spielberg is one of the incorporators, and Michael J. Devlet is alleged to be among those who caused the incorporation of the Cago Corporation for purposes of evading liability imposed by the Federal Farm Loan Act. The bill pleads that the corporation has never had any substantial assets, and that it 'is the mere agency and instrumentality of the persons aforesaid who caused it to be organized, or of other persons, some of whom are unknown to complainants, who are the real owners of said shares of stock and for whom the said Cago Corporation is a mere sham owner and shield. Such persons aforesaid are in fact the owners

within the meaning of the aforesaid Act of Congress' of those shares of stock of which the corporation is the record owner. If the appellants are able to establish at the trial that any or all of these three appellees are beneficial owners of any of the stock held in the name of the Cago Corporation, they will be liable for the assessment herein sought to be collected.''

District Court rulings arrive at the same conclusion that the shareholders of the holding company are liable for the assessment, *Anderson* v. *Atkinson*, 22 F. Supp. 853 (District Court, Illinois, 1938), involving the same assessment. *Partridge* v. *Ainley*, 28 F. Supp. 472 (District Court, New York, 1939), involved a joint stock land bank. In that case the Court said (p. 475):

''I find that this was not a case of a bona fide sale of the bank stock but was another instance—whereof there are many in the books—e. g. *Barbour* v. *Thomas*, 6 Cir., 86 F. (2d) 510, 517; *Ullrich* v. *Thomas*, 6 Cir., 86 F. (2d) 678, 679; *Metropolitan Holding Company* v. *Snyder*, 8 Cir., 79 F. (2d) 263, 266-268, 103 A. L. R. 912; *Brusselback* v. *Cago Corporation et al.*, D. C., 24 F. Supp. 524, 529, 530; *Holmberg* v. *Anchell et al.*, D. C., 24 F. Supp. 594, 599, wherein a holding company without double liability on its stockholders was formed to hold bank stock, and possibly also (although that matter not) to unify the control of the bank as much as might be, looking to its reorganization.''

Since the original plan in the instant case contemplated that the shareholders of the bank would incur no income tax liability on the exchange and would merely receive ''the same property in another form'' (Ex. V. 3, p. 1157), it cannot be claimed by the respondents that there was a bona file sale here.

The District Judge in the *Partridge* case held that the holding company did not constitute ''a 'nonconductor' of the double liability of the stockholders of the bank.'' 28

F. Supp. 472, 475. It is submitted Banco cannot be an insulator here.

In state courts where the question has arisen the courts have uniformly held the shareholders of the holding company liable for the assessment. In *Fors* v. *Farrell*, 271 Mich. 358, 260 N. W. 886 (1935), the Court summed up the law as follows:

> "That neither an individual nor a corporation can through a trust arrangement or by other indirect means or circumlocution possess as an owner and enjoy the beneficial interest in bank stock without assuming the contingent liability of a stockholder's assessment imposed by law. To hold otherwise would be to nullify the protection given the bank creditors by the statute imposing double liability" (P. 891).

* * * * * * *

> "In a proceeding to enforce stockholders' liability it is of little or no importance as to how many paper ownerships or holdings in trust may intervene between the bank that issued the stock and the ultimate or actual owner thereof. The beneficial owner is liable for the stock assessment. . . .
>
> "Surely it was never intended that this wholesome statutory provision (for double assessment) should be nullified by resort to indirect corporate holdings of such stock."
>
> ". . . its corporate structure cannot be used as a shield behind which an actual and beneficial owner of such stock may escape the statutory liability to insolvent bank's creditors" (Pp. 889, 890).

In *Nettles* v. *Sottile*, 184 S. C. 1, 191 S. E. 796 (1937), the Supreme Court of South Carolina held (p. 803):

> " 'Where the corporate form of organization is adopted or a corporate entity is asserted in an endeavor to evade a statute or to modify its intent, courts will disregard the corporation or its entity and look to the substance or reality of the matter.' "

In *Harris Investment Co.* v. *Hood*, 123 Fla. 598, 167 So. 25 (1936), the Supreme Court of Florida held (p. 30):

"The allegations of the bill of complaint are sufficient to show that the entire transaction was for the purpose of creating a *corporate entity to be controlled entirely by the bank stockholders* who transferred and assigned their bank stock to the corporation, so that, if the bank stock proved a good investment and paid dividends, *their corporation would likewise pay those dividends on to the stockholders in that corporation, while,* if the bank became insolvent and it became necessary to levy a capital stock assessment, there would be no assets available to the bank or the receiver on these particular shares of capital stock. If a transaction of this sort is to be countenanced by the courts, *then designing stockholders may at any time avoid all statutory liability for stock assessments by the very simple practice of organizing a corporation with capital stock equivalent only to that of the bank stock to be transferred to it, assign the bank stock to such corporation, and leave the other stockholders, as well as depositors and other creditors of the bank, without that protection and security which is provided by the statute authorizing stock assessments such as that under consideration here.*"

In *Hansen* v. *Agnew*, 195 Wash. 354, 80 P. (2d) 845 (1938), the Supreme Court of Washington adopted a lower court finding that the plan for the organization of the holding company was entered into in good faith, but reversed the lower court and held that the holding company stockholders were the real and beneficial owners of the stocks of the banks which it had acquired. In so ruling the Court said:

"In our opinion, the question of motive is entirely immaterial; nor is it necessary, in order to permit a recovery in this case, *to disregard the corporate entity of the holding company, or to invoke the com-*

paratively modern concept of alter ego, or even to fall back upon considerations of public policy; for *the statute contemplates that the superadded liability shall be that of the* real and beneficial owner of the stock." [80 P. (2d) 845, 851.]

Other State Court decisions are *White* v. *Aaronson*, 169 Misc. 593, 7 N. Y. S. (2d) 901 (1938); *Bacon* v. *Barbour*, 110 Vt. 280, 6 A. (2d) 9 (1939); *Flanagan* v. *Madison Square State Bank*, 306 Ill. App. 468, 24 N. E. (2d) 202 (1939); *Galinski* v. *Adler*, 302 Ill. App. 474, 24 N. E. (2d) 205 (1939).

ANALYSIS AND CRITICISM OF OPINIONS BELOW

Anderson v. Abbott, 127 F. (2d) 696, 32 F. Supp. 328

The District Court, in its opinion, *Anderson* v. *Abbott* (32 F. Supp. 328), gave full recognition to the fact that the officers and directors of the "unified" National Bank and Louisville Trust "caused" the organization of Banco, and that "the stockholders of the bank exchanged 95% of the stock of the bank for the stock of Banco." It stated that plaintiff contended that "Banco was organized as a holding company for the stock of the bank," and that Banco stockholders are "in reality" stockholders of the bank and "subject to double liability." It stated the defendants' position as follows (p. 329):

> *"The defendants contend that Banco was not a holding company but an operating corporation organized to engage in extensive business enterprises and that while the buying and holding of bank stock was to be one of its functions that was only incidental."*

The Court then said (p. 329):

> "The proof must establish that Banco was a holding company for the bank stock of the National Bank of Kentucky. Whether it was such a holding company

by reason of a fraudulent design to avoid a stock assessment or was organized with the purest of motives is of no consequence. The question is was it a holding company for this particular bank stock?"

Again at p. 333 the Court said:

> "The liability of the defendants is entirely statutory. They must be stockholders in the bank. If they are stockholders in reality, regardless of an intermediate corporation, they are subject to the assessment. *They are not stockholders in the bank if Banco was an operating company and not merely a holding company.*"

In its conclusion that Banco was an "operating" company and not a "holding" company the Court erred, we respectfully submit, because it accepted the broad charter powers of Banco and the matter in the stock selling prospectus of July 19, 1929, copied as an exhibit at the end of this brief, as the "avowed purposes" of Banco, and disregarded entirely the "real" purposes of Banco. To determine in law whether Banco was an "operating" or a "holding" company one must certainly look beyond its corporate purpose clause and the stock selling letter of its promoters. One would want to know, it seems, what it actually did as an "operating" company and what it actually did as a "holding" company.

How it could be an "operating" company without an office or place of business; without an employee; without a telephone and with only three little record books, is difficult to understand. It only engaged in twelve business transactions in the entire year of its existence. These transactions are set forth and discussed at page 29 herein. Every one of these transactions directly or indirectly relate to its real business of a bank stock holding company.

It did acquire and hold substantially all the stock of ten banks, including 95% of the stock of the National

Bank of Kentucky. It held these stocks, collected the dividends on them and paid the dividends out on the same day that they were received. Substantially all of its income came to it as the holder of bank stocks. Everything it did was "incidental" to its business of holding bank stock. Its holding of bank stock was certainly not incidental to its other business because it never had any other business.

The officials of Banco certainly knew whether it was a "holding" or "operating" company. What did they say in this respect? In their application to list the stock with the Louisville Stock Exchange they stated that it was "organized for the purpose of buying and controlling banks" (Ex. V. 5, p. 1695). In its sworn income tax return its business was stated as "holding company" (Ex. V. 5, p. 1846). In its report to the State of Delaware the nature of its business was stated:

> "To acquire control and operate banks and/or trust companies" (Ex. V. 5, p. 1921A).

To the Chicago Stock Exchange in a sworn statement its primary purpose was stated:

> "To acquire control and operate banks and trust companies" (Ex. V. 5, p. 1717).

And it was further stated therein that Banco "has limited its activities to acquiring control of banks and trust companies and the operation of the same" (Ex. V. 5, p. 1713).

The Court finally said that Banco "was not formed as a medium or agency through which to avoid double liability." We have never claimed that the primary purpose of Banco was to avoid this assessment. Our contention has always been that it was organized primarily to hold bank stocks and that while its organizers were getting up

the plans they included as an incident thereto an attempt to make the stock non-assessable.

The Circuit Court of Appeals in *Anderson* v. *Abbott*, 127 F. (2d) 696, did not base its opinion, as did the District Court, on the erroneous conclusion that Banco was an "operating" company and that its bank stock holdings were simply incidental to its other "extensive business enterprises."

The opinion of the Court of Appeals is analyzed in detail in the "Petition for Rehearing" found in the Record, Volume 3, page 327.

The Court of Appeals correctly concluded that the trust certificates, for which the bank stock was exchanged in the so-called "unification" of National Bank of Kentucky and Louisville Trust Company in 1927, was "the equivalent of bank stock" and that the holders thereof were "the real, beneficial shareholders of the National Bank of Kentucky." It based this conclusion upon the fact that the owners of the bank stock "carefully provided" that they should continue to be liable for any assessment. The Court then erroneously concludes that since they made no such careful provision for liability when they made the second exchange for BancoKentucky stock, they had, therefore, successfully evaded the statutory liability, and particularly so because they wrote a non-assessment section in the Articles of Incorporation and carried it on the stock certificates.

It is submitted that a bank stockholder cannot so easily excuse himself from liability. The only transfer of bank stock which releases the shareholder from this statutory liability is an "out and out" transfer, whereby the shareholder completely severs himself from his stock interest in the bank and completely divests himself of his opportunity of having a voice in its control, or the receipt of any of its earnings. This Court long ago said in *National Bank* v. *Case*, 99 U. S. 628 (631, 633):

"It is not every transfer that releases a stockholder from his responsibility as such. . . . (Liability continues if) the 'privileges and possible benefits of ownership continue.'" (Parenthetical insertion ours.)

Notwithstanding the fact that the Bank Examiners' reports for three full years had indicated that the bank was in financial straits, the appellate court said that "no probability of assessment" appeared when bank shares were exchanged for Banco shares. Liability does not depend upon pending insolvency. It arises by virtue of statute and depends upon ownership. The owner is the one who enjoys the "privileges and possible benefits" of the bank. *National Bank* v. *Case,* supra. What privilege or benefit did the owners of National Bank of Kentucky give up when they exchanged for Banco shares? In the words of their own lawyer, they kept "the same property in another form." Louisville Trust Company said it "was in its essence a mere continuation and retention of the ownership of Trustees' Participation shares," which were conceded to be the equivalent of bank stock (Ex. V. 4, pp. 1886, 1887, 1890, 1896).

Certainly the trading of bank stock for holding company stock simply cannot be a "reorganization" to escape taxes, and at the same time a "sale" to escape assessment.

The Court of Appeals concluded that BancoKentucky was not organized for the primary purpose of escaping double liability. It is not necessary to quarrel with this conclusion. BancoKentucky was promoted by the owners of the bank to enable them to continue in the banking business, not for the purpose of getting out of the banking business. As an incident, they provided as best they could that the Banco shares should not be assessable and by the language of their charter and the words on their stock certificates, as evidenced by Bean's letter to Brown, infra, p. 26, they knew very well that they were attempting to escape this liability.

The Court of Appeals, in its opinion, makes a great deal out of the fact that three million dollars of the cash raised by Banco was not invested in bank stocks. This statement is completely answered by the fact that five million dollars of Banco's cash assets came out of the National Bank of Kentucky upon loans made solely upon the security of Banco stock and that over two million of said amount was lost by the National Bank of Kentucky. And in any event, the three million dollars was not "invested" by Banco. Twenty-five thousand dollars was invested in Union Central Life Insurance Company stock. Brown took two million dollars of the invested three million dollars without asking anybody about it, substituted his note therefor and no one knew that Banco had Brown's note until after the failure (R. 2, pp. 64, 98). The remainder of the "invested" three million dollars went in an attempt to peg the market of its own stock. The Caldwell deal was never consummated. Therefore, it is undisputed in the record that all of BancoKentucky's cash was invested in bank stocks, and in buying its own stock to peg the market, except the twenty-five thousand dollars in Union Central shares (R. 3, p. 322).

The Court of Appeals quoted with approval and adopted the statement from another case involving the bank and Banco:

> "There is nothing in the record to point to it as an instrumentality of the bank."

As to this statement the Court will please note the fact that Banco was created by resolution of the Board of Directors of the National Bank of Kentucky on June 21, 1929 (Ex. V. 2, p. 994), and that the Banco prospectus provided

> *"that it be managed and operated by the Boards of Directors and the officers of the two banks."*

It is therefore submitted that it was a creature of the banks and that for all time it was to "be managed and operated" by the banks.

CONCLUSION

In conclusion, therefore, it is submitted that the record indisputably shows that BancoKentucky Company was organized to support a failing national bank; organized by ex-owners of bank stock in order that they might continue in the banking business on a grander scale; and organized for the purpose of holding double liability bank stocks.

> "The Directors of the National Bank of Kentucky caused to be organized this holding company, to which was given the suggestive name of BancoKentucky Company, which was, indeed, intended to be, and was, in many important respects and in a very real sense, as the record abundantly shows, the National Bank of Kentucky." *Anderson* v. *Akers*, 7 F. Supp. 924, 950 (1934).

Banco's doing business in Kentucky was unlawful because it never qualified to do business there. (Ky. Stat. 571.) Its ownership of all the stock of Louisville Trust Company and several other Kentucky state banks was expressly forbidden by Kentucky law. (Ky. Stat. 581, 609.) Except for a few days in October, 1929, when it first started business, all of its assets were in bank stocks and it never thereafter had any assets with which to pay an assessment upon these bank stocks. It was never anything more than a corporate instrumentality of the shareholders in order that they might continue in the banking business, get all possible benefits therefrom and at the same time escape a statutory assessment in the event that one should be levied.

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APPENDIX A

Louisville, Ky., July 19, 1929.

To the Holders of Trustees' Participation Shares,
National Bank of Kentucky and The Louisville Trust Company:

1. Your Officers and Directors have studied the rapidly changing conditions in the banking business in America, with a view to preparing the two banking institutions under their management, to meet these changed conditions, and to take early advantage of new opportunities presented thereby.

2. *The conclusion unanimously reached, as a result of their deliberations, is that the two banks, and the business conducted by them, should be reorganized by adding to this group a third corporation, which will make the operations of these banking institutions more profitable, expand their facilities, and thus develop for the entire group new and profitable financial opportunities and connections.*

3. Such a reorganization is in line with the trend of business and finance in this country; and the strength and influence of the new corporation will not only greatly benefit the two banks and the territory they now serve, but will also be a stabilizing influence in banking circles throughout this section of the country. The new corporation can exercise many profitable and important functions which neither a bank nor a trust company has authority to exercise, and can take advantage of many sound and profitable financial opportunities, frequently presented in the course of business of the two banks, but not available to them, because of the restrictions upon their powers and activities.

4. The following is the Plan of Reorganization agreed upon by the Officers and Directors of the two banks, and approved by formal Resolutions of the Trustees, under the Trustees' Agreement for the National Bank of Kentucky and The Louisville Trust Company.

5. There has been organized under the laws of the State of Delaware, a corporation known as The BancoKentucky Company, with an authorized capital of 2,000,000 shares, having a par value of Ten ($10.00) Dollars each. The stock will be exchanged or sold, in accordance with this Plan, on the basis of Twenty-five ($25.00) Dollars per share, which will give the Company a capital of Twenty Million ($20,-000,000.00) Dollars, and a surplus of Thirty Million ($30,-000,000.00) Dollars, or a total capital and surplus of Fifty Million ($50,000,000.00) Dollars. No stock will be sold by the Company at less than twenty-five ($25.00) Dollars per share.

6. The corporation is given broad charter powers, including the right to acquire stocks, bonds and other securities of other corporations, and evidences of indebtedness created or issued by other corporations; the power to underwrite securities and take part in syndicate management, and to charge fees and commissions for its services in connection with the reorganization or refinancing of other corporations; the power to issue bonds and to guarantee the obligations of others and to become surety, guarantor and endorser thereof. The foregoing is merely a brief summary of the broad powers given the corporation; complete details of these powers appear in the Certificate of Incorporation of the Company, copies of which may be examined at the offices of the two banks by any one interested.

7. *It is an essential part of this reorganization that the shares of this corporation (or at least a substantial majority thereof) be owned by the Trustees' Participation Shareholders, and that it be managed and operated by the Boards of Directors and the officers of the two banks. The BancoKentucky Company, therefore, offers to the Trustees' Participation Shareholders of the National Bank of Kentucky and The Louisville Trust Company, through the*

Trustees as agents in the transaction, its entire capital stock, on the bases and subject to the terms and conditions hereinafter set out:

8. It is an essential part of this plan that:

(a) On or before September 19, 1929, the holders of the Trustees' Participation Shares must deposit their Certificates with the Trustees for exchange into the shares of The BancoKentucky Company; and for each Participation Share thus deposited, the Trustees will cause to be issued to the holder thereof, Two (2) shares of the stock of the new corporation. In addition thereto the depositing shareholder will have the right to subscribe for as many additional shares of the stock of the BancoKentucky Company as he may desire at the price of Twenty-five ($25.00) Dollars per share subject to allotment ratably if over-subscribed. Trustees' Participation Shareholders who fail to deposit their shares on or before September 19, 1929, will be deemed to have waived their rights to thus exchange their shares and subscribe for stock in the new Company, unless the Trustees shall extend the time for deposit and subscription (as they may do in their discretion), in which event the Trustees' Participation Shareholders will be deemed to have waived their rights, unless their shares are deposited within the extended time.

(b) *The entire Plan of Reorganization*, and the deposit and subscription privileges and rights hereinabove set out, are all, and each of them is, *conditioned expressly upon the acquisition by the Trustees' Participation Shareholders, either by deposit for exchange, or by direct subscription as above, of at least a majority of the shares of The BancoKentucky Company; and further conditioned upon the acquisition by The BancoKentucky Company of at least a majority of the Trustees' Participation Shares issued and outstanding as of September 19, 1929.*

9. It is the unanimous recommendation of your Officers, Directors and Trustees of the National Bank of Kentucky and The Louisville Trust Company, that the Trustees' Participation Shareholders immediately deposit their shares under this Reorganization Plan, and that they exercise their right to subscribe to the additional shares of stock of the BancoKentucky Company.

10. There is enclosed herewith a subscription form covering this transaction, which you are asked to sign at your earliest opportunity and deposit with the Trustees, at their office, 421 West Market Street, together with your Certificate or Certificates for Trustees' Participation Shares, endorsed in blank and witnessed. There will be issued to you an Interim Receipt for the shares deposited which, when the Plan has become effective as above set forth, may be presented for exchange for the permanent certificates of the BancoKentucky Company, in accordance with the Plan of Reorganization.

NATIONAL BANK OF KENTUCKY
By James B. Brown
President

THE LOUISVILLE TRUST CO.
By Richard Bean
President

APPENDIX B

COPY OF STATUTES INVOLVED—ALL FROM UNITED STATES CODE, TITLE 12, BANKS & BANKING

§ 63. Individual liability of shareholders.

The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association existing on June 22, 1874, under State laws, having not less than $5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of 20 per centum shall be kept undiminished, and be in addition to the surplus provided for in this chapter; and if at any time there is a deficiency in such surplus of 20 per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of this chapter relating to dissolution and receivership. (R. S. § 5151; Dec. 23, 1913, c. 6 § 23, 38 Stat. 273.)

§ 64. Individual liability of shareholders; transfer of shares.

The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have

transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, § 23, 38 Stat. 273.)

§ 191. General grounds for appointment of receiver.

Whenever any national banking association shall be dissolved and its rights, privileges, and franchises declared forfeited, as prescribed in section 93, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192. (June 30, 1876, c. 156, § 1, 19 Stat. 63.)

§ 192. Default in payment of circulating notes.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he

deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

PROVIDED, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited:

PROVIDED, That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depositary shall pay upon such money interest at such rate as the Comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits. (R. S. § 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, § 339, 49 Stat. 721.)